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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1994

LARRY NORRIS, Director,
Arkansas Department of Correction
PETITIONER

V.

DAVID LEE STARR
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WINSTON BRYANT
Arkansas Attorney General

BY: *OLAN W. REEVES
Senior Assistant Attorney General
Arkansas Bar No. 85136
200 Tower Building
323 Center Street
Little Rock, AR 72201
(501) 682-8078
ATTORNEYS FOR PETITIONER
*COUNSEL OF RECORD

PARAGON PRINTING & STATIONERY CO., INC.

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER IT WAS ERROR FOR THE EIGHTH CIRCUIT COURT OF APPEALS TO DETERMINE THAT AKE V. OKLAHOMA IS VIOLATED AT THE PENALTY PHASE, WHEN A CRIMINAL DEFENDANT RECEIVES ASSISTANCE OF STATE HOSPITAL MENTAL HEALTH EXPERTS, BUT IS DENIED THE ADDITIONAL ASSISTANCE OF A FAVORABLE PSYCHIATRIST OF HIS OWN CHOOSING?

II.

WHETHER IT WAS ERROR FOR THE EIGHTH CIRCUIT COURT OF APPEALS TO DETERMINE THAT THE BRECHT HARMLESS ERROR STANDARD DID NOT APPLY ON COLLATERAL REVIEW TO HABEAS TRIAL ERROR CLAIMS, BUT INSTEAD TO APPLY CHAPMAN BECAUSE THE STATE COURT HAD FOUND NO ERROR?

III.

WHETHER IT WAS ERROR FOR THE EIGHTH CIRCUIT COURT OF APPEALS TO DETERMINE THAT STARR'S COUNSEL WERE INEFFECTIVE FOR NOT CHALLENGING AN AGGRAVATING CIRCUMSTANCE, THE CONSTITUTIONALITY OF WHICH HAD PREVIOUSLY BEEN UPHELD BY THE STATE COURT?

PARTIES

The parties to this proceeding are Larry Norris, Director, Arkansas Department of Correction, Petitioner, and David Lee Starr, a death row inmate in the Arkansas Department of Correction, Respondent. Petitioner files this petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES
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LARRY NORRIS, Director,
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V.

DAVID LEE STARR — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Larry Norris, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

On appeal, the Eighth Circuit Court of Appeals opinion is reported in Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994). The opinion of the Court is reprinted in slip opinion form in Appendix A. Petition for rehearing and rehearing en banc were denied. Starr v. Lockhart, (Case No. 92-1466EA, 8th Cir. June 10, 1994). The opinion of the Court is reprinted in slip opinion form in Appendix B. The opinion of the District Court is unreported and is found in slip opinion form in Appendix C. The opinion of the Arkansas Supreme Court is reprinted in Appendix D.

JURISDICTIONAL STATEMENT

Petitioner asserts that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; ...

The Right to Counsel Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Respondent, David Lee Starr, was convicted in Helena, Arkansas in Phillips County, of capital murder for the killing of Gladys Ford and sentenced to death. Respondent was wanted for burglary and theft in another county (Monroe) before he committed the murder in this case. This information was relayed to the police in Phillips County, Arkansas on June 9, 1984, and respondent was questioned about the crimes in the other county and fled during the questioning. On June 11, 1984, Gladys Ford was struck outside her home with a pipe and dragged inside her home and raped. She was found by relatives immediately thereafter. Her house had been ransacked. Respondent became a suspect because he had been seen near the scene of the murder, had been to the house looking for work and had done work for the victim on prior occasions. A palm print, footprints, blood and semen samples were taken from the murder scene. These were later matched to the respondent. On June 13, 1984, respondent narrowly escaped the police, who were looking for him. On June 14, 1984, the arrest warrants from Monroe County for burglary and theft arrived in Phillips County at the Marvell Police Department. Respondent was arrested the next day at his sister's house on the warrants from Monroe County. After he surrendered, the police found a pistol behind a couch which had been taken from Gladys Ford's house.

At the jail, respondent was informed of his rights and made a statement shortly thereafter. He denied the murder of Gladys Ford but insisted that he had gotten the pistol from someone he did not know. He was informed of his rights when he was taken to the jail in another nearby town and said he wanted to make another statement. After a visit to the scene of the crime, he stated that his girlfriend had hit Mrs. Ford. He indicated to the police where the metal pipe used to hit the victim had been. He also told them where the pipe was hidden inside the victim's house. This statement was recorded and entered at the trial.

He then gave a third statement after he told the police he wanted to tell them some more information and confessed to the crime in detail. He also admitted that he hit the victim with the pipe, raped her, ransacked the house looking for money and took the pistol. This statement was also recorded and entered at the trial. Respondent was then arrested for the murder of Gladys Ford and charged with capital murder.

His conviction and sentenced were affirmed on appeal to the Arkansas Supreme Court. When he filed his federal habeas corpus case, the District Court denied relief without an evidentiary hearing. On appeal, the Eighth Circuit Court of Appeals affirmed denial of relief as to all claims but granted relief as to two claims concerning the penalty phase. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994). The court found the error was not harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967), finding that in spite of this Court's recent decision in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), the standard to be applied was still the Chapman standard in this habeas case. The Eighth Circuit also improperly applied the standard under Ake v. Oklahoma, 470 U.S. 68 (1985) to this case. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994). The Court also improperly found an error as to the aggravating circumstances that the jury found in this case based upon ineffective assistance of counsel. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994). Petitioner Norris seeks review on certiorari from that decision.

REASONS FOR GRANTING THE WRIT

1.

WHETHER IT WAS ERROR FOR THE EIGHTH CIRCUIT COURT OF APPEALS TO DETERMINE THAT AKE V. OKLAHOMA IS VIOLATED AT THE PENALTY PHASE, WHEN A CRIMINAL DEFENDANT RECEIVES ASSISTANCE OF STATE HOSPITAL MENTAL HEALTH EXPERTS, BUT IS DENIED THE ADDITIONAL ASSISTANCE OF A FAVORABLE PSYCHIATRIST OF HIS OWN CHOOSING?

Respondent Starr alleged that the denial of his request for an independent psychiatrist to assist him at the guilt and penalty phase of his capital murder trial was error. On direct appeal, the Arkansas Supreme Court held in Starr v. State, 297 Ark. 26, 35-36, 759 S.W.2d 535 (1988), cert. denied, 489 U.S. 1100 (1989), that:

> The defense argues it wanted to show that Starr could not intelligently waive his rights. ... The defense does not contend that the mental examination of Starr did not fulfill the requirements of Ake v. Oklahoma, 470 U.S. 68 (1985). It contends more was required in this particular case. State officials who examined Starr would have been available to answer any questions Starr had in that regard. The answers sought by Starr were simply not there.

Petitioner Norris asserts as he did below that Starr did not raise this claim in state court as he did in his federal habeas. He specifically stated he did not want to raise the claim he has raised now. Thus this claim is procedurally defaulted. The Court of Appeals found that he had raised the claim in the trial court and because the Arkansas Supreme Court reviews all objections decided adversely to a defendant if abstracted, then the claim is not procedurally defaulted

For the Court of Appeals to state that the claim is not procedurally defaulted because of Arkansas Supreme Court Rule ll(f) is in error. This is because in spite of the defense requests for an independent psychiatrist and the trial court's rejection of that request, it would not have been addressed by the Arkansas Supreme Court, when Starr on appeal had specifically told the court it was not raising this claim. Thus the claim is indeed procedurally defaulted. Starr must show cause and prejudice before he can have this claim addressed. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982). Because this claim was specifically not raised even though present, the Court of Appeals cannot find the claim to have been reviewed on direct appeal. See Ruiz and Van Denton v. Lockhart, 754 F.2d 254 (8th Cir. 1985); Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985). However, here the claim was specifically not raised and thus would not have been considered even under Rule ll(f) by the Arkansas Supreme Court. Starr did not raise an ineffective assistance of counsel claim on this basis in his post-conviction petition under A.R.Cr.P. Rule 37. In Murray v. Carrier, 477 U.S. 478 (1986), this Court held that a claim alleging cause for procedural default must be presented to the state courts before it can be used as cause for procedural default in federal habeas corpus. Starr cannot show cause as he never raised this in state court and he cannot now use it as cause for his procedural default. Murray v. Carrier, supra. Starr cannot use ineffective assistance of post-conviction counsel as cause for procedural default. Coleman v. Thompson, 111 S.Ct. 2546 (1991). Thus this claim is procedurally defaulted and should not have been addressed below.

The District Court decided the claim on the merits rather than deal with the procedural default aspect. This is proper. Long v. Iowa, 920 F.2d 4 (8th Cir. 1990). Petitioner asserts that Starr was not entitled to relief on the merits of this issue. The District Court held:

The court has little trouble finding that by making

> competent psychiatrists from the state hospital available to petitioner, the standards and requirements of Ake v. Oklahoma, 470 U.S. 68 (1985), have been met. A complete reading of this record leaves no doubt that the jury was well apprised of petitioner's mental condition. Further analysis by additional doctors might have been interesting, but would not have materially changed the jury's understanding of petitioner's mental retardation. [District Court Order, p. 24, Appendix C]

Petitioner asserts that because the requirements of Ake v. Oklahoma, 470 U.S. 68 (1985), have been met, Starr cannot show any violation here. He had the benefit of the testimony of Dr. Simon at the guilt and penalty phases of the trial, who had evaluated Starr at the state hospital. He did not even point the district court, nor the Court of Appeals to some additional information that could be obtained from the independent psychiatric expert that would have benefited the defense at either the guilt or penalty phases of the trial. He should not have obtained relief on this claim.

In Ake v. Oklahoma, 470 U.S. 68 (1985), this Court addressed the question of when an indigent defendant is entitled to access to a psychiatric examination and assistance in preparing a defense. Id. at 70. This Court held that:

> when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

Ake v. Oklahoma, 470 U.S. at 74.

In deciding when sanity would be a significant factor, this Court found that an examination of the facts present in that case is necessary. Id. at 86. This Court noted that (1) insanity was Ake's only de-

fense, (2) Ake displayed bizarre conduct before trial, (3) Ake was found incompetent by the state hospital initially, (4) Ake was later found competent conditioned upon his taking medication, (5) during his competency evaluations, Ake's problems were found to have started years earlier, and (6) the burden is on Ake under Oklahoma law to show the insanity defense. Id. at 86. Most of these are not present in Starr's case. Starr did not indicate and does not indicate or argue now that he wanted to raise insanity but instead asserts now that he wanted to raise diminished capacity. Petitioner Norris asserts that Starr's sanity was not a significant issue at his trial based upon the factors to be evaluated as announced by this Court in Ake v. Oklahoma, 470 U.S. at 86. Starr did not exhibit bizarre behavior at any time before or during trial, he was always found competent when examined, and insanity was not a defense at all. He only sought to raise diminished capacity.

This assistance includes access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. Id. at 83. This Court stated that the means of implementing these requirements should be left to the states. More importantly, this Court noted that the indigent defendant did not have a constitutional right to choose a psychiatrist or to receive funds to hire his own. Id. at 83. The decision in the present case is in direct conflict with Ake v. Oklahoma, supra.

Arkansas law provides for access to competent psychiatric assistance upon a showing that the indigent defendant's mental state will be a significant issue in the trial or proceeding. This has been found to be adequate by the Eighth Circuit Court of Appeals. Fairchild v. Lockhart, 900 F.2d 1292, 1296 (8th Cir. 1990), cert. denied, 497 U.S. 1052 (1990). The evaluations and examinations performed at the Arkansas State Hospital are independent. Beard v. State, 306 Ark. 546, 816 S.W.2d 860 (1991).

Starr is not entitled to an expert who will reach a biased or even favorable conclusion. Ake v. Oklahoma, 470 U.S. at 83; Harris v. Vasquez, 949 F.2d 1497 (5th Cir. 1990), cert. denied, 112 S.Ct. 1275 (1992); Henderson v. Duqqer, 92S F.2d 1309 (11th Cir. 1991), cert. denied, 113 S.Ct. 621 (1992); Granviel v. Lynaugh, 881 F.2d 185 (5th Cir. 1989), cert. denied, 495 U.S. 963 (1990); Martin v. Wainwright, 770 F.2d 918 11th Cir. 1985), cert. denied, 479 U.S. 909 (1986). The Courts of Appeals have decided that this Court's decision in Ake does not provide for psychiatric assistance as a tool necessary for the defense but as a means to aid the trial court's adjudication and disposition of the case. Harris v. Vasquez, 949 F.2d at 1516; Henderson v. Dugger, 925 F.2d at 1316; Glass v. Blackburn, 791 F.2d 1165, 1169 (5th Cir. 1986), cert. denied, 481 U.S. 1092 (1987). The Court of Appeals in its decision in this case below, indicated that the focus should be on the tools necessary for a defendant's defense even without the state's use of psychiatric evidence. This seems in conflict with this Court's opinion in Ake. This is an expansion of Ake that by the decision in Ake itself is not proper.

Before trial Starr was evaluated at the Arkansas State Hospital by Dr. Michael Simon, a psychologist and the Director of Psychiatric Services, Dr. Roy Ragsdill, a psychiatrist. Dr. Ragsdill diagnosed Starr as being mildly mentally retarded, a substance abuser, and as having an antisocial personality disorder. Starr's attorneys then asked for additional funds to hire another psychiatrist to perform additional, unspecified evaluations to assist in the preparation of the defense. This was denied by the trial court because he found that Starr had received sufficient psychiatric assistance at the State Hospital. The trial court also found that nothing prevented the defense from calling those mental health professionals at the trial. The Court of Appeals held that the trial court erred in denying Starr additional funds to hire a psychiatrist of his choosing because the psychiatric evaluations performed by the psychologist and psychiatrist were inadequate. Starr v. Lockhart, 23 F.3d 1280, 1291 (8th Cir. 1994).

Starr did not present nor is there any evidence in the record that he even attempted to contact the psychiatrists at the Arkansas State Hospital to determine if they would be able to assist him at trial. Starr did not ask the trial court to send him back to the two doctors who had already examined him for further testing before requesting the new psychiatric assistance. See Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992). Without such a showing or request by Starr to the trial court, it would have been difficult for the trial court to conclude that the state hospital personnel would be unable to assist Starr at trial. This is especially true in light of the fact that the state made it clear to the trial court that it had no intention of calling either expert as a witness for the state.

The record does not reflect that Starr had presented any information to the trial court at the time the request for additional psychiatric assistance of Starr's choosing was made. The opinion is devoid of any discussion of the unreasonableness for the trial court to believe that these experts could not discuss, at the guilt or penalty phase, the diagnosis, the basis of the diagnosis, and the effect of the diagnosis upon responsibility. The opinion is also devoid of any discussion regarding the additional tests which should have been performed. This is because Starr has never told the substance of these new evaluations or the information he was seeking from these new evaluations or tests. The Court of Appeals simply assumed that because the information the attorneys needed was not contained in the psychiatric reports, that the psychiatric examinations were inadequate and that the psychiatrists could not aid in Starr's defense. There is not even any argument by Starr at trial, on appeal, in his habeas proceedings or before the Court of Appeals concerning this issue. It was simply assumed by the Court of Appeals in making their decision. Petitioner Norris asserts that Starr did not make the required showing under Ake and thus, the Court of appeals decision is in error.

The necessary showing that is required for receiving this additional

psychiatric or mental health assistance should be a high one. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986), rev'd in part on other grounds, 822 F.2d 1477 (1987)(en banc) aff'd, 486 U.S. 356 (1988). The Tenth Circuit Court of Appeals found the threshold showing to be "a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial" before he is entitled to psychiatric assistance. Cartwright v Maynard, 802 F.2d at 1211. This has been followed by other circuits as well. Harris v. Vasquez, 949 F.2d 1497, 1516 (9th Cir. 1991); Volson v. Blackburn, 794 F.2d 173, 175-6 (5th Cir. 1986), cert. denied, 112 S.Ct. 1275 (1992). A defendant must inform the trial court how the requested expert would assist him in light of the nature of the prosecution's case and demonstrate a substantial basis for an affirmative defense for which expert assistance would be required. Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.), cert. denied, 481 U.S. 1054 (1987).

When a federal court is evaluating a trial court's decision to deny an additional psychiatric evaluation, the court must look only to the evidence or information that was before the trial court at the time the decision was made. Ake v. Oklahoma, 470 U.S. at 1097-98. This issue was not whether Starr was entitled to a psychiatric examination but whether he was entitled to another examination. For the Constitution to require a state court to order another psychiatric examination, there must be some showing made before the trial court to demonstrate that the earlier examination or expert is insufficient or inadequate. See Moore v. Kemp, 809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054 (1987); Volson v. Blackburn, 794 F.2d 173 (5th Cir. 1986).

The Court of Appeals cited no information in the record that was presented to the trial court before trial that would justify the need for the appointment of another psychiatrist of Starr's choosing; rather the opinion, using hindsight, points to the actual trial testimony of the psychologist (not the psychiatrist) as evidence that the examina-

tion was inadequate. The Court of Appeals should not rely on information that was not before the trial court at the time the trial court made its decision. Moreover, simply because the psychologist was unable to answer, to Starr's satisfaction, the questions asked at trial, this does not resolve the issue with respect to the psychiatrist who also examined Starr and who made a more detailed diagnosis. This is similar to evaluating or reviewing a psychiatrist's performance, which should not be done on habeas review. Harris v. Vasquez, 949 F.2d at 1518; Silagy v Peters, 905 F.2d 986 (7th Cir. 1990), cert. denied, 111 S.Ct. 1024 (1991) .

The Court of Appeals points to the psychologist's inability to explain the results of previous mental health examinations, because he was not familiar with the methodology of the tests and his inability to explain what it meant for an adult to have the mental age of seven as evidence that the trial court erred in denying Starr the appointment of another psychiatrist. The Court of Appeals implicitly concluded, therefore, that Starr is entitled to "effective assistance" of an expert. This conclusion is contrary to existing precedent, and its application is barred by Teague v. Lane, 489 U.S. 288 (1989). The Court of Appeals' decision below in Starr v. Lockhart, supra, evaluates the psychiatric assistance that Starr got at his trial and decides that it was not proper. This is the very thing that should be avoided in these cases.

This Court's decision in Ake is grounded in the right to expert assistance in the Due Process Clause of the Fourteenth Amendment, not in the Sixth Amendment right to effective assistance of counsel. In fact, this Court explicitly refused to consider the applicability of the Sixth Amendment. Ake v. Oklahoma, 470 U.S. at 87, n. 13. The danger in allowing a claim concerning the adequacy of the evaluation has been expressed by several courts as being a never ending process and a battle of psychiatrists that will go on and on. Harris v. Vasquez, 949 F.2d 1497 (5th Cir. 1990), cert. denied, 111 S.Ct. 1024 (1991); Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990), cert. denied,

111 S.Ct. 1024 (1991). See also Clisby v. Jones, supra. In Harris v. Vasquez, 949 F.2d at 1518, the Court held:

> Allowing such battles of psychiatric opinions during successive collateral challenges to a death sentence would place federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process.

There is no constitutional entitlement to effective assistance of experts. To create such would constitute a violation of Teague v. Lane. Harris v. Vasquez, 949 F.2d at 1518. This Court should overturn the Court of Appeals decision for the reasons cited above.

II.

WHETHER IT WAS ERROR FOR THE EIGHTH CIRCUIT COURT OF APPEALS TO DETERMINE THAT THE BRECHT HARMLESS ERROR STANDARD DID NOT APPLY ON COLLATERAL REVIEW TO HABEAS TRIAL ERROR CLAIMS, BUT INSTEAD TO APPLY CHAPMAN BECAUSE THE STATE COURT HAD FOUND NO ERROR?

Respondent David Lee Starr raised a claim of violation of due process in his habeas petition because he was not afforded psychological assistance at the penalty phase of his trial. Respondent Starr committed the murder of Gladys Ford during a robbery and rape and was convicted of capital murder. At the penalty phase he was sentenced to death. He had requested the assistance of a mental health expert for the preparation of the guilt phase of his trial but it was denied. He had also argued for the assistance of a mental health expert to discuss his mental retardation as to mitigation at the penalty phase. When raised on direct appeal, the Arkansas Supreme Court found no violation of Ake v. Oklahoma, 470 U.S. 68 (1985) as to the guilt phase. Starr v. State, 297 Ark. at 36. The Eighth Circuit Court of Appeals reversed

State, 297 Ark. at 36. The Eighth Circuit Court of Appeals reversed the denial of relief on this claim and found that harmless error analysis does apply to this type of error. Starr v. Lockhart, 23 F.3d at 1292. The Court of Appeals then held in Starr v. Lockhart, 23 F.3d at 1292, that:

> There are, however, two separate harmless error analyses for the denial of constitutional rights. The first, whether the error was harmless "beyond a reasonable doubt," is known as Chapman v. California, 386 U.S. 18 (1967) analysis. The second, whether the error "had substantial or injurious effect or influence in determining the jury's verdict," is the analysis now normally used on habeas review. Brecht v. Abrahamson, ___U.S.___ ,___ , 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993). Because state courts are required to apply Chapman analysis on direct review, it makes little sense to require federal habeas courts to engage in an identical analysis and thereby undermine the finality of state convictions which have survived direct review. Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993)[, cert. denied, ___ U.S.___ (1994)]. In Orndorff, we addressed the question of which standard was appropriate, on habeas review, for constitutional error which the state courts have not had any opportunity to address. Id. We concluded that Brecht's reasoning was inapplicable in those situations, and that Chapman was the appropriate standard. Id.
>
> In Starr's case, the state courts have had an opportunity to review the Ake problem, but found that there was no constitutional error. The question then becomes which standard of review is appropriate if the state courts had the opportunity to address the constitutional error under the Chapman standard but did not do so because they found that there was no error. ... Orndorff purported to answer it, but because that case had a different posture, its answer is not controlling. We believe, however, that the reasoning in Orndorff applies equally to Starr's situation. Considering an issue and find-

ing no error does not carry with it an implicit Chapman analysis, and thus Brecht does not apply.

Thus, the Court of Appeals has found that the standard announced in Brecht v. Abrahamson 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993) will not apply when the issue is not raised in state court but is only raised in federal habeas. Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), cert. denied, ___U.S.___ , (No. 93-1012 1994). The Court of Appeals now finds that Brecht will not apply when the state court addresses the issue but finds no error and thus does not do any harmless error analysis. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994).

Petitioner asserts that the only time the Court of Appeals will apply the Brecht standard is when the state court does find error and does find it harmless under Chapman v. California, 386 U.S. 18 (1967). This will reward the habeas petitioner to withhold the claim until federal habeas to receive a higher standard of harmless error as in Orndorff. This seems to circumvent the very reason this Court found in Brecht that collateral review of claims in federal habeas should be different than that used by the state courts or otherwise on direct review.

Even after this Court decided Brecht v. Abrahamson, 507 U.S.___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Eighth Circuit Court of Appeals agreed that an analysis under Brecht would normally cover this issue but not in the present case. 23 F.3d at 1292. The Eighth Circuit also found that it would not apply in Orndorff v. Lockhart, 998 F.2d at 1436. Other circuits which have considered the issue have applied Brecht in collateral review cases. Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994); Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994); Shaw v. Collins, 5 F.3d 128 (5th Cir. 1993); Tague v. Richards, 3 F.3d 1133 (7th Cir. 1993); Wright v. Dallman, 999 F.2d 174 (6th Cir. 1993); Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993); Quinn v. Neal, 998 F.2d 526 (7th Cir. 1993); Stoner v. Sowders, 997 F.2d

issue before the state court as it would not be binding on the federal court or be given deference. See Wright v. Dallman, supra..

The issue for the court to decide is whether the alleged constitutional violation, the State's failure to provide mental health assistance at the penalty phase, constituted harmless error. This Court has modified the standard to be applied for reviewing a constitutional violation for harmless error in Brecht v. Abrahamson, 507 U.S.___ , 113 S.Ct. 1710 (1993). The new standard is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" 113 S.Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). However, the Court of Appeals declined to apply this standard. Instead, the Court applied the standard established previously in Chapman v. California, 386 U.S. 18 (1967). This Court applied the lesser standard to the defendant in the Brecht case. This Court found the trial error did not warrant the granting of habeas relief in the case. Brecht v. Abrahamson, supra. Petitioner Norris asserts, as he did below, that the decision below erred in refusing to apply the Brecht standard in reviewing whether the constitutional error in this case was harmless error.

In Brecht, this Court held that the standard to be applied on collateral review of claims of the trial error type is the Kotteakos standard (substantial and injurious effect or influence) while holding that the standard to be applied on direct review by state courts is the Chapman standard. In Brecht, this Court did not hold that the Kotteakos standard will apply only when the state court does not apply the Chapman standard. That seems an unworkable type of application that could not be applied in a uniform manner.

Collateral review is different from direct review. Brecht v. Abrahamson, 113 S.Ct. at 1719; Wright v. West, 112 S.Ct. 2482, 2490 (1992). While direct review is the principal avenue for challenging a conviction, habeas review is secondary and should be limited. Id. at

(1992). While direct review is the principal avenue for challenging a conviction, habeas review is secondary and should be limited. Id. at 1719. The distinction between direct review and collateral review is recognized and discussed in Brecht, 113 S.Ct. at 1720, with this Court finding that different standards have been applied on habeas than would be applied on direct review with respect to matters other than harmless-error analysis. See also Wright v. West, 112 S.Ct. at 2490-2491.

This Court held that this new standard of substantial or injurious effect, would be applied to cases which were trial error type cases. 113 S.Ct. at 1717. These would be errors that occur during the presentation of the case to the jury. Id. at 1717. This type of analysis should be assessed in the context of other evidence presented to determine the effect it might have had on the trial. Id. Because this alleged error would be included in the trial type errors mentioned in Brecht, this should be found to be trial error and thus subject to the harmless error analysis found in Brecht.

The Brecht decision did not state that in certain types of cases a different standard would be applied by a federal habeas court depending on the standard applied by the state court on direct review. 113 S.Ct. at 1720. This Court stated in Brecht that there is one standard for collateral review and another standard for direct review. This Court unequivocally holds that the Kotteakos standard is the one to apply in federal habeas cases. There is no caveat discussed or mentioned by this Court in the Brecht case. Thus, the Eighth Circuit opinion in this case is in error in holding that the Brecht standard does not apply to this case.

Petitioner will not repeat the harmless beyond a reasonable doubt argument under Chapman made before the Eighth Circuit Court. The district court found that respondent Starr was not denied his right to due process because he received assistance from the state hospital

would not have materially changed the jury's understanding of his mental condition. This is precisely the type of analysis that this Court found should be done under this less onerous standard. Brecht, 113 S.Ct. at 1717. This Court found that to perform this type of analysis it is necessary to quantitatively assess the error in the context of other evidence presented to determine the effect the error had on the trial. Id; Arizona v. Fulminante, 499 U.S.___ , 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Petitioner asserts this issue cannot be examined in any other manner. In footnote 9 of the Brecht opinion, this Court found the harmless beyond a reasonable doubt standard could still apply in an exceptional case, petitioner asserts that this is not one of those cases. As this Court stated in Brecht v. Abrahamson, 113 S.Ct. at 1717, the federal habeas court must review the evidence in the case to determine if the alleged error was prejudicial to Respondent Starr. Thus the district court properly decided this claim.

In conducting its harmless error analysis the Court of Appeals did not identify any evidence on the record that would indicate what additional evidence the new psychiatrist could have presented that would have benefited Starr. Indeed, the Court of Appeals cannot identify any such evidence because it was not presented as there was no hearing before the district court, it was not argued nor attached to any pleadings, and the post-conviction petition (Rule 37) was denied without an evidentiary hearing in the state court. It certainly was not presented to the trial court when the request was made for these additional funds. The Court of Appeals simply presumed, without evidence, that if the new psychiatrist was called to testify his testimony would have been positive to Starr and would have mitigated the jury's sentence of death. Such a result should not be assumed because there is no evidence in the record which supports such a conclusion.

There is some evidence to suggest that juries do not react favorably to mental illness defenses. Kerrin M. McCormack, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of

ably to mental illness defenses. Kerrin M. McCormack, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake, 30 Am. Crime L. Rev. 1329, 1366 (1993). In one study, jurors exposed to mental illness defense were more punitive, while jurors exposed to an anticapital punishment defense were less punitive in a crime fact pattern similar to the one in this case. Lawrence T. White, Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies, 11 Law and Human Behavior 113-130 (1987). In fact the study concluded that a mental illness defense appears to be relatively ineffective.

Petitioner also asserts that a reviewing court must be careful not to overestimate the value and validity of psychiatric testimony. Studies have shown that psychologists and psychiatrists do not necessarily make more accurate clinical judgments than lay persons. David Faust and Jay Ziskin, The Expert Witness in Psychology and Psychiatry, Science, vol. 241, July 1, 1988, pp. 31-35. Studies show that when lay persons and psychiatrists are presented with the same basic facts they reach similar conclusions. Id. Therefore, it would follow that if the underlying facts of a defendant's mental condition are presented to a jury they will be able to reach a conclusion similar to one a psychiatrist would, regarding his mental state or ability to function. It cannot be presumed that if the jurors did not hear the expert's assessment of Starr's mental retardation they were unable to reach their own, comparably accurate, assessment of Starr's perception and understanding of the cruelty and gravity of his conduct.

If the Court were to apply the lesser standard of Brecht, Petitioner Norris asserts that Respondent Starr's death sentence must be affirmed.

When this evidence (mental health allegations) is reviewed in light of the other evidence against Starr, Petitioner Norris asserts that there is no substantial or injurious effect and this did not influence the jury's

The evidence adduced at the trial established the following: [1] Respondent, David Lee Starr, was convicted of capital murder for the killing of Gladys Ford and sentenced to death. Starr was wanted for burglary and theft in Monroe County before he committed the murder in this case. This information was relayed to the Phillips County authorities on June 9, 1984, and respondent was questioned about the crimes in the other county and fled during the questioning. On June 11, 1984, Gladys Ford was struck outside her home with a pipe and dragged inside her home and raped. She was found by relatives immediately thereafter. Her house had been ransacked. Respondent became a suspect because he had been seen near the scene of the murder, had been to the house looking for work and had done work for the victim on prior occasions. A palm print, footprints, blood and semen samples were taken from the murder scene. These were later matched to the respondent. On June 13, 1984, respondent narrowly escaped the police, who were looking for him. On June 14, 1984, the arrest warrants from Monroe County for burglary and theft arrived in Phillips County at the Marvell Police Department. Respondent was arrested the next day at his sister's house on the warrants from Monroe County. After he surrendered, the police found a pistol behind a couch which had been taken from Gladys Ford's house.

At the jail, respondent was informed of his rights and made a statement shortly thereafter. He denied the murder of Gladys Ford but insisted that he had gotten the pistol from someone he did not know. He was informed of his rights when he was taken to the jail in another nearby town and said he wanted to make another statement. After a visit to the scene of the crime, he stated that his girlfriend had hit Mrs. Ford. He indicated to the police where the metal pipe used to hit the victim had been. He also told them where the pipe was hidden

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[1] All of the facts are found in: Starr v. State, 297 Ark. 26, 759 S.W.2d 535 (1988), cert. denied, 489 U.S. 1100 (1989); Starr v. Lockhart, 23 F.3d at 1283-1287.

inside the victim's house. This statement was recorded and entered at the trial.

He then gave a third statement after he told the police he wanted to tell them some more information and confessed to the crime in detail. He also admitted that he hit the victim with the pipe, raped her, ransacked the house looking for money and took the pistol. This statement was also recorded and entered at the trial. Respondent was then arrested for the murder of Gladys Ford and charged with capital murder.

At the penalty phase of Starr's trial, the jury was presented evidence both as to aggravating circumstances and mitigating circumstances. The jury unanimously found at least two aggravating circumstances. The jury found no mitigating circumstances. The jury then unanimously found that the death penalty should be imposed against Starr.

This higher standard under Chapman would only apply in a direct review case and not a collateral review case such as this. Brecht, supra.

Petitioner asserts that based upon the evidence presented at the penalty phase, Starr's death sentence was the result of the evidence presented there and would not be changed by mental health assistance. Based upon the findings by the jury at the penalty phase of the trial, the giving of the death sentence was not substantially influenced by mental health assistance or lack thereof and is harmless beyond a reasonable doubt as well.

III.

WHETHER IT WAS ERROR FOR THE EIGHTH CIRCUIT COURT OF APPEALS TO DETERMINE THAT STARR'S COUNSEL WERE INEFFECTIVE FOR NOT CHALLENGING AN AGGRAVATING CIRCUMSTANCE, THE CONSTITUTIONALITY OF WHICH HAD PREVIOUSLY BEEN UPHELD BY THE STATE COURT?

Starr was convicted at a jury trial of capital murder and sentenced to death. He alleged that he was denied effective assistance of counsel at the penalty phase of his bifurcated trial when his defense counsel failed to object to both of the aggravating circumstances that the jury found. The jury found that Starr committed the murder for pecuniary gain and that the crime was especially heinous, atrocious, and cruel.

Starr alleged that the aggravating circumstance of pecuniary gain had been found to be double counting by the Eighth Circuit Court of Appeals and thus invalid in his case. Collins v. Lockhart, 754 F.2d 258 (8th Cir.) cert. denied, 474 U.S. 1013 (1985). He argued that this was the law during Starr's trial and his counsel were ineffective for not objecting on that basis. Fretwell v. Lockhart, 946 F.2d 571 (8th Cir. 1991). This Court decided Lockhart v. Fretwell, 113 S.Ct. 838 (1993) and found that an attorney cannot be found ineffective in this situation. See also Lowenfield v. Phelps, 484 U.S. 231 (1988). The Court of Appeals agreed in this case. Starr v. Lockhart, 23 F.3d at 1285.

The District Court held that assuming that the counsels' conduct fell below the objective reasonable standard regarding this aggravating circumstance, Starr could not show prejudice because there was another aggravating circumstance found by the jury.

Starr was charged with capital murder with two underlying felonies in the information, burglary and rape. The bulk of the evidence presented at trial centered on the rape. The jury was instructed on both underlying felonies, and the evidence on the underlying felony of rape was overwhelming.

Starr alleged that the second aggravating circumstance (especially heinous, atrocious and cruel), later found to be violative of the Constitution, was invalid because it does not provide for the required narrowing function. Maynard v. Cartwright, 486 U.S. 356 (1988). After Starr's trial, this aggravating circumstance was held unconstitutional by the Arkansas Supreme Court. Wilson v. State, 295 Ark. 682, 751 S.W.2d 734 (1988). Starr alleged that counsel were ineffective for not anticipating that this aggravating circumstance would be eventually struck down and that the argument should have been made by them.

The District Court held on this issue that:

> However, the issue here is not whether the rule should be applied retroactively, but whether counsel was ineffective for failing to make the same arguments that resulted in the decision in Maynard. The Court does not agree that counsel was ineffective for failing to formulate the ultimately successful argument in Maynard. Therefore, this ground for relief is rejected. [District Court Order, p. 17, Appendix C.]

Starr alleged that Maynard v. Cartwright, supra, was applicable to his case because it was not a new rule. The Eighth Circuit Court has held that Maynard is an application of Godfrey v. Georgia, 446 U.S. 420 (1980), rather than an extension of it. Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989). In affirming the district court's granting of habeas relief, the Court of Appeals stated that Maynard was not a new rule as it was based upon the holding in Godfrey, because this does not provide the required channeling or limiting. 885 F.2d at

1333. Thus, the Court held that Maynard was not a new rule. See also Stringer v. Black, 112 S.Ct. 1130 (1992).

Starr's defense counsel in the present case should not be found ineffective for not making an objection based upon Godfrey because at the time of trial Maynard had not been decided. The Arkansas Supreme Court had also not decided Wilson v. State, supra. Thus, at the time of trial counsel would have had to have anticipated that the extension of Godfrey would be applied to the Arkansas penalty phase aggravating circumstance in question here. The defense counsel should not be found ineffective where they were having to anticipate a change in the law or an extension in the law, or a clarification in the law. Randolph v Delo, 952 F.2d 243 (8th Cir. 1992); Johnson v. Armontrout, 923 F.2d 107 (8th Cir.), cert. denied, 112 S.Ct. 106 (1991). They would also have had to anticipate that the Arkansas Supreme Court would have struck down the aggravating circumstance in Wilson v. State. This seems an impossible task for counsel to be burdened with anticipating these many results.

At the time of trial, it is true that this Court had rendered its opinion in Godfrey but it had also decided Proffitt v. Florida, 428 U.S. 242 (1976). That case had upheld this aggravating circumstance because it had been narrowed by the definition in the Florida Supreme Court cases. Thus the defense counsel here could not have been as certain that the aggravating circumstance would have been struck down or was even in jeopardy because of the divergent case law dealing with this issue.

Even an attorney's failure to raise a claim that has been clearly defined by Supreme Court case law, does not necessarily make his representation deficient. Randolph v. Delo, supra; Weekley v. Jones, 927 F.2d 382 (8th Cir. 1991). Defense counsels' decision not to raise even a valid, well defined claim can be based upon reasoned trial strategy which does not make the representation ineffective Randolph

even a valid, well defined claim can be based upon reasoned trial strategy which does not make the representation ineffective Randolph v. Delo, supra. See also Wright v. Nix 928 F.2d 270 (8th Cir. 1991). Thus, Petitioner asserts that the performance did not fall below an objective reasonable standard. The District Court agreed and found that Starr had not shown the counsel's conduct to be deficient.

Even assuming that the performance was deficient, Starr must show prejudice. Starr must still show prejudice even if he shows that counsel failed to object to a well defined valid claim. Weekley v. Jones, supra. Starr cannot do so because he cannot show a reasonable probability that the result of the proceeding would have been different.

The Eighth Circuit found that counsel's error rendered the outcome of the proceeding unreliable and resulted in prejudice to Starr, because the error allowed the jury to consider an impermissible aggravating circumstance. Starr v. Lockhart, 23 F.3d at 1286. Implicit in this conclusion is that if error is found under Godfrey v. Georgia, 446 U.S. 420 (1980), that Strickland v. Washington, 466 U.S. 668 (1994), prejudice follows automatically. This is contrary to Strickland because it merges Sixth and Eighth Amendment prejudice analysis.

There can be no presumption of prejudice where counsel does not adduce evidence at the penalty phase which would be mitigating evidence in an Eighth Amendment sense. Strickland v. Washington, 466 U.S. at 692-93, 699-70. Rather, this Court has provided that in a weighing state if the defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer (including an appellate court which reweighs) would have concluded that the balance of the aggravating and mitigating circumstances did not warrant the death penalty. Strickland, 466 U.S. at 695.

The Eighth Circuit found the existence of a Godfrey claim to be sufficient for a finding of prejudice. Starr v. Lockhart, 23 F.3d at 1286.

In light of the fact that the jury found another valid aggravating circumstance, it cannot be presumed that the jury would not have imposed the death penalty, or that upon reweighing, the Arkansas Supreme Court would not impose the death penalty.

If more than one aggravating circumstance is submitted and for some reason one is eliminated, the death sentence does not automatically fall because the state law provides a harmless error analysis can be applied and a decision made if the elimination of an improperly considered aggravating circumstance did affect the balance of aggravating and mitigating factors. Barclay v. Florida, 463 U.S. 939 (1983). Arkansas has the same statute, Ark. Code Ann. § 5-4-603(D) (Supp. 1991), as Florida and thus petitioner asserts that should this Court agree that one of these aggravating circumstances was improper, the above result should be followed. Barclay v. Florida, supra. The Eighth Circuit disagreed.

In a situation which involves a constitutionally vague aggravating circumstance the proper remedy would be to remand the case to the state appellate court with the option of imposing a limiting construction on the aggravating circumstance. See Walton v. Arizona, 497 U.S. 639 (1990). The state appellate court has already reweighed the circumstances here and found the error harmless in the post-conviction petition proceedings. See Clemmons v. Mississippi, 494 U.S. 738 (1990); Barclay v. Florida, 463 U.S. 939 (1983). See Stringer v. Black, 112 S.Ct. 1130, 1137 (1992).

A new sentencing proceeding is not the appropriate remedy for a death sentence based on the consideration of a vague aggravating factor. It is the most intrusive option that the Court of Appeals had available to cure perceived error.

Therefore, the decision holds that a new penalty phase is required because of the ineffective assistance of counsel which conflicts with precedent from this Court.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court state that review on writ of certiorari will be granted when there are special and important reasons therefor. This case presents issues worthy of such review. Petitioner respectfully submits that the United States Court of Appeals' holding that the harmless beyond a reasonable doubt standard instead of the lesser standard as announced by this Court should apply to a due process claim, is incorrect. Thus, based upon the foregoing citations of authority, petitioner respectfully prays that this Court grant review on writ of certiorari.

WINSTON BRYANT
Arkansas Attorney General

BY: *OLAN W. REEVES
Senior Assistant Attorney General
Arkansas Bar No. 85136
200 Tower Building
323 Center Street
Little Rock, AR 72201
(501) 682-8078

ATTORNEYS FOR PETITIONER
*COUNSEL OF RECORD

APPENDICES

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-1466

David Lee Starr,
Appellant,

v.

A. L. Lockhart, Director,
Arkansas Department of
Corrections,
Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 12, 1993

Filed: May 2, 1994

Before MCMILLIAN and BEAM, Circuit Judges, and HAMILTON, District Judge.

BEAM, Circuit Judge.

David Lee Starr was convicted of capital murder and sentenced to death by the State of Arkansas. After exhausting his state remedies, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2554. The district court denied Starr's petition without holding an evidentiary

*The HONORABLE JEAN C. HAMILTON, United States District Judge for the Eastern District of Missouri, sitting by designation.

hearing. We find that Starr was denied Sixth and Fourteenth Amendment rights at the sentencing phase of his trial. As a result, his death sentence is based on an aggravating factor which is impermissibly vague under the Eighth Amendment. We also find that Starr was sentenced in violation of his right to due process of law. We therefore reverse and remand with instructions to the district court to issue the writ.

I. BACKGROUND

David Lee Starr attacked seventy-six year-old Gladys Ford while she was sweeping her sidewalk on a June morning in 1985. He struck her on the head with an iron pipe and then "helped" her into her home, where he struck her again. The two blows shattered Mrs. Ford's skull in five places and caused her midbrain to separate from her mainbrain, rendering her unconscious. Starr proceeded to search each room of Mrs. Ford's home for money but found only a pistol. He then carried Mrs. Ford into her bedroom and raped her. Starr attempted to hide his crime by covering the trail of Mrs. Ford's blood with bedding and then fled through a window. Mrs. Ford died shortly thereafter.

Immediately after his arrest, Starr denied any involvement in Mrs. Ford's murder. Later, he asked to speak with the police. After accompanying police to the murder scene, Starr gave a statement and admitted being at the crime scene. He indicated that his girlfriend had been the murderer and told police where the murder weapon was hidden. Shortly thereafter, Starr confessed, step-by-step, to the entire crime. In addition, Starr's palm print was found next to Mrs. Ford's body, Mrs. Ford's pistol was found at the house where Starr was arrested, Starr knew intimate details of the crime, and the semen recovered from Mrs. Ford is of a type found in only eight percent of the male population which includes Starr. In short, the evidence against Starr was overwhelming.

In October of 1986, Starr was convicted of capital murder and sentenced to death. His strategy at trial, and at his sentencing, was to present evidence of diminished capacity based on his mental retardation. This strategy failed. After receiving the death sentence, Starr appealed to the Arkansas Supreme Court which affirmed his conviction and sentence. Starr v. State, 759 S.W.2d 535 (Ark. 1988), cert. denied, 489 U.S. 1100 (1989) Subsequently, Starr petitioned for collateral relief from his conviction and sentence under Rule 37 of the Arkansas Rules of Criminal Procedure. Starr's petition was denied. Starr v. State, 1989 Ark. LEXIS 517 (Ark. Nov. 13, 1989) (per curiae), cert. denied, 494 U.S. 1020 (1990). Starr then filed his federal petition for a writ of habeas corpus in the district court and requested an evidentiary hearing on four issues. The district court denied Starr's request for an evidentiary hearing and denied his petition. Starr appeals.

II. DISCUSSION

We must reverse the district court's denial of the writ although there is no doubt that David Lee Starr committed the acts which resulted in Mrs. Ford's death. We reverse on two grounds, either of which would independently support reversal. That being true, we note that the combination of these grounds, together with other troubling aspects of the proceedings against Starr, render Starr's death sentence infirm.

A. SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Starr was entitled to effective assistance of counsel at his trial, sentencing, and at his appeal of right. Strickland v. Washington, 466 U.S. 668, 68-9 (1984); Evitts v. Lucey, 469 U.S. 387, 396 (1985). Starr alleges that his counsel's failure to object to either the "pecuniary

gain" or the "heinous, atrocious, or cruel" aggravating circumstances instruction at the sentencing stage constituted ineffective performance. We agree.

Because the facts are not in dispute, the district court, as it is permitted to do, decided this ineffective assistance claim on the record. See Chandler v. Armontrout, 940 F.2d 363, 366 (8th Cir. 1991). We review questions of ineffective assistance based on an undisputed factual record de novo. See Laws v. Armontrout, 863 F.2d 1377, 1381 (8th Cir. 1988), cert. denied, 490 U.S. 1040 (1989).

Our scrutiny of defense counsel's performance is deferential. We presume counsel's conduct to be within the range of competence demanded of attorneys under like circumstances. Strickland, 466 U.S. at 687-89. However, when the appellant shows that defense counsel "failed to exercise the customary skills and diligence that a reasonably competent attorney would exhibit under similar circumstances," that presumption must fail. Hayes v. Lockhart, 766 F.2d 1247, 1251 (8th Cir.) (emphasis added), cert. denied, 474 U.S. 922 (1985).

In evaluating counsel's performance, we must take into consideration all the circumstances, including the fact that this was a capital sentencing proceeding. The basic concerns of counsel during a capital sentencing proceeding are to neutralize the aggravating circumstances advanced by the state, and to present mitigating evidence. The state asserted two aggravating circumstances at Starr's sentencing hearing. They were: 1) "[t]he capital murder was committed for pecuniary gain;" and 2) "[t]he capital murder was committed in an especially heinous, atrocious, or cruel manner." The jury was instructed that it must find that either one or the other of the aggravating circumstances existed beyond a reasonable doubt in order to sentence Starr to death. At the time of Starr's sentencing, both of these aggravating factors had been found to be unconstitutional. See Godfrey v. Georgia, 446 U.S. 420 (1980) (outrageously or wantonly vile, hor-

rible or inhuman is an unconstitutionally vague aggravating circumstance); Collins v. Lockhart, 754 F.2d 258 (8th Cir.) (pecuniary gain aggravating circumstance in burglary context is impermissible double counting), cert. denied, 474 U.S. 1013 (1985). Despite the fact that a minimum of research would have revealed these cases, counsel failed to object to either aggravating factor as unconstitutional.

Since Furman v. Georgia, 408 U.S. 238 (1972), constitutional concern has been directed toward whether the aggravating circumstances used by states in death penalty proceedings adequately prevent the substantial risk of arbitrary and capricious imposition of the death penalty prohibited by the Eighth Amendment. Failure to investigate the constitutionality of the aggravating circumstances under which one's client is to be put in jeopardy of the death penalty falls well below the standard of representation required for capital defendants. See Lockhart v. Fretwell, 113 S. Ct. 838, 842 n.1 (1993).

1. Pecuniary Gain Aggravating Circumstance

In order to prevail on his ineffective assistance claim, Starr must also show prejudice in addition to deficient performance. Fretwell, 113 S. Ct. at 842. The failure to discover that a likely meritorious objection could have been made to the pecuniary gain aggravating factor did not prejudice Starr because that factor was subsequently found to be constitutional. Perry v. Lockhart, 871 F.2d 1384 (8th Cir), cert. denied, 493 U.S. 959 (1989). As the Court explained in Fretwell, the failure to object to an aggravating circumstance which, at the time of trial, had been held unconstitutional by the relevant circuit court, but which was later deemed constitutional, does not result in ineffective assistance of counsel because there has been no prejudice to the defendant. Fretwell, 113 S. Ct. at 843-44. In such a case, counsel's deficient performance merely results in the defendant losing a legal

windfall rather than a constitutional right to which he or she was entitled. Loss of a windfall does not constitute prejudice. Id. Thus, Starr cannot show prejudice by his counsel's failure to object to the pecuniary gain instruction.

2. Heinous, Atrocious, or Cruel Aggravating Circumstance

The district court found that Starr's counsel did not perform deficiently in failing to object to the "heinous, atrocious, or cruel" aggravating circumstance, on the ground that the impermissible vagueness of that instruction was a new rule that counsel was not required to foresee. We disagree.

In 1980, six years before Starr's sentencing proceeding, the Supreme Court reversed a jury's imposition of a death sentence which was based on the aggravating circumstance that the crime was "outrageously or wantonly vile, horrible, and inhuman." Godfrey, 446 U.S. at 428-29. In Godfrey, the Court explained that such an aggravating circumstance instruction could not prevent a substantial risk of the arbitrary and capricious imposition of the death penalty. Such standardless discretion in the imposition of the death penalty violates the Eighth Amendment. Id. at 427-28.

The Supreme Court later held in Maynard v. Cartwright, 486 U.S. 356, 362-64 (1988), that there is no functional difference between the "especially heinous, atrocious, or cruel" aggravating circumstance and the "outrageously or wantonly vile, horrible, and inhuman" aggravating circumstance rejected in Godfrey. Either instruction is too vague to adequately channel a death sentence determination for Eighth Amendment purposes.

Subsequently, the Supreme Court addressed the question of whether Maynard's invalidation of the "heinous, atrocious, or cruel" aggravating circumstance created a new rule for the purposes of habeas

review. Stringer v. Black, 112 S. Ct. 1130 (1992). New rules, with few exceptions, are not available to those defendants seeking habeas relief whose convictions were final (i.e., who had exhausted all direct appeals) before the new rule was announced. Teague v. Lane, 489 U.S. 288, 311 (1989); see also Penry v. Lynaugh, 492 U.S. 302, 314 (1989). A decision is a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301. Precedent does not dictate the result in a given case when it is "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415 (1990). Applying this "new rule" standard, the Supreme Court held that Maynard's invalidation of the "heinous, atrocious, or cruel" aggravating circumstance did not state a new rule. Stringer, 112 S. Ct. at 1135.

Thus, the Supreme Court has determined that, after the 1980 Godfrey decision, reasonable minds could not fail to realize that the "heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague. We must therefore reject the district court's determination that counsel was not ineffective for failing to make this "novel" argument at trial. The argument was not "novel" in any sense of the word. The state's argument that Starr's counsel should not have been expected to foresee the "expansion" of Godfrey to Maynard is completely circular, because as the state itself admits, Maynard was not an "expansion" of Godfrey. See Stringer 112 S. Ct. at 1135, 1140 (that Maynard is not a new rule is "a wise concession" by the State of Mississippi); Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989) (Maynard is an application of, not an extension of, Godfrey and is therefore not a new rule), cert. denied, 497 U.S. 1038 (1990). To be effective, counsel in capital cases must at least recognize and object to those sentencing factors which cannot reasonably be argued to be valid under existing law. We can conceive of no trial strategy that justifies a contrary approach, and therefore reaffirm our finding that Starr's counsel performed deficiently in failing to object to this aggravating circumstance.

We now consider whether Starr suffered Strickland prejudice from counsel's deficient performance. To amount to prejudice, counsel's errors must have rendered the outcome of the preceding unreliable. Fretwell, 113 S. Ct. at 842. The Supreme Court has held that in weighing states such as Arkansas, the consideration of an invalid aggravating sentencing factor is fatal to the reliability of the sentence.[1] Stringer, 112 S. Ct. at 1137. Use of one invalid aggravating factor is fatal to a death sentence in a "weighing" state, even where the jury has found other valid aggravating circumstances, because the invalid factor operates as an impermissible "thumb" on death's scale. Id. Such a result is dictated by existing precedent and is not a new rule unavailable to habeas petitioners. Id. Starr's counsel's deficient performance therefore resulted in Starr being subjected to an unreliable determination that he should receive the death penalty. Such unreliability easily suffices to establish Strickland prejudice.

B. DUE PROCESS

Starr's strategy at the guilt phase of his trial was to present evidence of diminished capacity. His strategy at the sentencing phase was to argue that his diminished capacity and family background rendered him less morally culpable than a person of ordinary intelligence with a normal background. He thus hoped to be spared the death penalty.

Starr is one of fourteen children, and was raised in a functionally polygamous family until he was about seven. At that time Starr's

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[1] In "weighing" states the jury must first find that at least one aggravating circumstance exists, then consider any evidence presented in mitigation, and finally find that the aggravating circumstances outweigh the mitigating circumstances before it can impose the death penalty.

father was shot and killed by his father-in-law.[2] Starr then moved in with his uncle and twenty-one to twenty-five children. His mother died shortly thereafter. Starr has spent time in institutions for the mentally retarded and has scored from thirty-nine to sixty-two on I.Q. tests. Even Starr's highest scores place him well within the mildly retarded or lowest one percent of the adult population in intelligence.

Starr requested that an expert be appointed to aid him in presenting his evidence of diminished capacity, at both the guilt and sentencing phases of his trial The trial court denied the request, ruling that Starr's ability to subpoena the mental health professionals involved in his court ordered competency exam, which was conducted at the behest of a joint motion by the prosecution and defense, enabled him to present his defense and to prepare evidence in mitigation for the eventual penalty phase. We find this to have been error. Ake v. Oklahoma, 470 U.S. 68 (1985) (due process requires that indigent defendant be provided with access to a psychiatrist to aid in evaluation, preparation, and presentation of defense or mitigating evidence when the defendant's mental condition is a serious issue); Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (en banc) (indigent defendants must be provided with expert assistance when they show a reasonable probability that an expert would aid in their defense, and that the denial of expert assistance would result in an unfair trial), cert. denied, 487 U.S. 1210 (1988). While the question is close, we find any error at the guilt phase to have been constitutionally harmless. The error at the sentencing phase, however, mandates reversal.

1. Procedural Bar

The state argues that even if such Ake error exists, the issue is procedurally barred. We are perplexed by this contention. Before his

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[2]Starr's father's legal wife was not Starr's mother.

trial commenced, Starr filed a motion for expert assistance and he objected to the motion's denial. He again raised the motion after his counsel obtained additional evidence concerning his family history and degree of mental retardation, when the need for an expert became more apparent. The trial court again denied his motion and Starr again registered his objection. Counsel thus preserved any Ake error made at trial or sentencing.

Although Starr did not artfully raise this aspect of the Ake issue on direct appeal, [3] the Supreme Court of Arkansas regularly reviews the merits of all issues raised at trial in capital cases to guard against fatal errors. Ruiz v. Lockhart, 754 F.2d 254, 25657 (8th Cir. 1985), vacated on other grounds, 476 U.S. 1112 (1986). We have previously held that a court's independent review of the record for error overcomes the procedural bar as to those errors preserved in the record. Id. at 257. The Supreme Court of Arkansas performed its regular review in this case, Starr v. State, 759 S.W.2d at 540, and thus decided the merits of any Ake error. Furthermore, Starr clearly raised the Ake issue as to the appointment of an expert in his petition to proceed under Rule 37. Joint Appendix at 76. The Arkansas Supreme Court declined to consider the issues ruling that it had been raised and resolved on direct appeal and was therefore unavailable for Starr's Rule 37 petition. Joint Appendix at 86. Because the issue was raised at trial, and later raised and addressed in the Arkansas Supreme Court, there is no procedural bar.

2. Expert Assistance

Upon the joint motion by the prosecution and defense, the Arkan-

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[3]On direct appeal, Starr, relying on Ake, challenged the adequacy of the court-ordered examination for purposes other than insanity and competency to stand trial.

sas trial court ordered Starr to be examined by doctors at the Arkansas State Mental Hospital to determine his competency to stand trial, his ability to understand the difference between right and wrong, and his ability to act accordingly. The experts concluded that Starr was "mildly retarded," but able to know right from wrong, able to conform his conduct to the law, and competent to stand trial. Based on the exam results, and on his personal dealings with Starr, defense counsel moved for the appointment of a mental health expert to assist Starr in developing evidence of diminished capacity and evidence of mitigating circumstances. Counsel estimated the cost of the requisite expert assistance to be $2,500. Starr's counsel informed the court that Starr was given to fits of uncontrollable anger, and that a mental health expert was necessary to aid counsel not only in developing the evidence of diminished capacity, but also to enable Starr to assist with his defense.

The state opposed the motion arguing that based on the results of the state exam already performed, the defendant had not met his burden to show that his mental condition was reasonably in issue and, therefore, the court had no duty to appoint an expert. In the alternative, the state contended that the defendant's access to the court-ordered report coupled with his ability to question the examiners in court provided Starr with the basic tools necessary for an adequate defense. The trial court denied the motion, agreeing with the state that Starr had not shown that his sanity was in issue. The court also agreed that Starr's ability to subpoena the experts who had performed the court-ordered exam satisfied any right Starr might have to psychiatric assistance. In so deciding, the trial court relied on Andrews v. State, 578 S.W.2d 585 (Ark. 1979), an Arkansas Supreme Court case which predates Ake, and on its view that Ake did not require any more than the state exam which the defendant had already received.

Ake is one in a line of due process cases requiring that an indigent defendant be supplied with the basic tools necessary for an effective defense. See David A. Harris, The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants, 83 J. Crim. Law & Criminology 469, 474-83 (1992). Ake establishes that one of the basic tools to which due process entitles indigent defendants is the services of court-appointed experts to "conduct . . . appropriate examinations and [to] assist in evaluation, preparation, and presentation of [their] defense." Ake, 470 U.S. at 83. Ake also explains that, when appropriate, the right to expert assistance extends to the sentencing phase of capital proceedings. Id. at 86.

Although Ake was decided in the context of insanity rather than mental retardation, the Court extensively discussed the importance of psychiatric testimony to a defendant whose mental condition is crucial to his defense. Id. at 79-81. The Court also instructed that a defendant's interests in access to expert assistance outweigh the state's economic interests in avoiding the cost of an expert when the defendant's "mental condition" is seriously in issue in a capital case. Id. at 82. The Court's concern was heightened because Ake's mental condition was his only defense. Id. at 86. Like Ake, Starr's mental condition was his only viable defense and his strongest argument in mitigation for sentencing purposes. Thus Starr's situation falls well within Ake's dictates that a capital defendant whose mental condition is seriously in issue be provided with expert assistance.[4]

However, our cases have interpreted Ake to require the appointment of an expert only if the defendant shows "a reasonable probability that an expert would aid in his defense, and that denial of

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[4]The Eighth Circuit has not limited the right to expert assistance to questions of sanity. Little, 835 F.2d at 1243.

expert assistance would result in an unfair trial." Little, 835 F.2d at 1244; see also Ake, 470 U.S. at 82-83; Caldwell v. Mississippi, 472 U.S. 320, 323 n.l (1985). Starr made that showing to the trial court. He presented the court with mental health records dating back to 1977 which showed that he had been diagnosed as being from mildly to moderately retarded. He also presented the results of his court-ordered competency exam, which confirmed that he was still mildly retarded. The examiners' report did not address or explain at what level a mildly retarded person functions, or how such retardation affected Starr's appreciation of the results of actions he admittedly knew were wrong.[5] Starr's counsel pointed out the inadequacy of the examination to the trial court and explained his inability to address these questions without expert assistance. These questions were crucial to Starr's defense and to his presentation of mitigating evidence in the penalty phase of the trial. Starr therefore met his burden of showing a reasonable probability both that an expert would aid in his defense and that denial of expert assistance would result in an unfair trial.

We also find the trial court's alternative finding, that Starr's due process right to expert assistance was satisfied by the court-ordered examination and by the defense's ability to subpoena the state examiners, to be erroneous on two grounds. First, the examination was not appropriate to Starr's needs. Second, the ability to subpoena a state examiner and to question that person on the stand does not amount to

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[5]Starr told police that he had "popped" Mrs. Ford and then "popped" her again after he "helped" her into her home, when she attempted to rise. He also told them that he hadn't intended to kill her. The extent of Starr's comprehension of his own strength and of the likelihood that "popping" Mrs. Ford on the head with an iron pipe would result in death are questions which an Ake expert could have developed for the jury. A parallel line of inquiry would have been into Starr's level of premeditation in relation to the eventual rape of Mrs. Ford.

the expert assistance required by Ake.

a. An Appropriate Examination

The inappropriateness of the available psychiatric examination was the key issue triggering the Ake decision. Ake, 470 U.S. at 72 (Ake had been examined for competency to stand trial, but not for his sanity at the time of the offense). As Ake explains, due process requires access to an expert who will conduct, not just any, but an appropriate examination. Id. at 83. We find that Starr's exam was inappropriate because it did not delve into the mitigating questions essential to Starr. As the Arkansas Supreme Court has recognized, the issue of mitigation, or diminished capacity, is different from that of guilt, Neal v. State, 623 S.W.2d 191, 193 (Ark.). The Arkansas Supreme Court has also noted that the exam and report statutorily mandated in Arkansas at the time of Starr's trial, and which Starr received, "is obviously not broad enough to cover everything a defendant might raise as a 'mental defect' basis of mitigation." Couter v. State, 804 S.W.2d 348, 356 (Ark.), cert. denied, 112 U.S. 102 (1991). In Coulter, the defendant was not prejudiced by the trial court's denial of funds to procure the requisite Ake expert assistance to aid in the presentation of mitigating evidence because his appointed defense counsel had generously procured the needed expert with his own funds. Id. Starr was not so lucky.

We agree with the Arkansas Supreme Court that a report on the

four statutorily mandated items[6] does not suffice to cover everything a defendant might raise as a "mental defect" in mitigation and for which an Ake expert is required. In Starr's case, the examination merely found Starr to be :

> aware of the nature of the charges and the proceedings taken against him. He is capable of cooperating effectively with an attorney in the preparation of his defense.
>
> At the time of the commission of the alleged offenses the defendant did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

State Trial Transcript at 54. These conclusions can only establish that Starr is criminally responsible for his acts, not the degree of such responsibility. The difference between Starr's perceptions of the probable results of the acts he committed and those of a person of normal mental capabilities, a crucial issue for Starr, was not addressed either

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[6] A defendant is entitled to a referral to state mental health examiners after filing notice with the court that "there is reason to believe that mental disease or defect of the defendant will or has become an issue in the cause." Counter, 804 S.W.2d at 356. The examiners must provide:

(1) A description of the nature of the examination;
(2) A diagnosis of the mental condition of the defendant;
(3) An opinion as to his capacity to understand the proceedings against him and to assist effectively in his own defense;
(4) An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the alleged conduct.

Id.

by the report or the underlying examination. The issue was crucial because in our system of criminal justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more culpable than those committed by a person without that appreciation. See Penry, 492 U.S at 322-23; Ford v. Wainwright, 477 U.S. 399, 406-10 (1986); Kerrin M. McCormick, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake, 30 Amer. Crim. L.J. 1329, 1336 (1993). For this reason, Starr needed an expert to make an appropriate examination and to explain the effects of his retardation on his relative culpability at the sentencing phase of the proceedings.[7]

The inadequacy of the examination is illustrated by the testimony of the examining psychologist. The psychologist testified that Starr was mildly retarded, but was unable to explain to the jury the level of Starr's social and intellectual functioning because his tests had not dealt with that. Nor was he able to interpret or explain the results of

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[7]We note that although the mitigating evidence question has usually come up in the context of sentencing as opposed to guilt determinations, evidence of diminished capacity may be relevant at both phases. The question of mental condition cannot be neatly divided into sanity at the time of the offense as the relevant issue at the guilt phase, and mitigating evidence as the relevant issue at sentencing. If the question could be so divided, Starr's exam might have been appropriate at least for the guilt phase. However, a defendant's limited understanding of the probable results of his actions could easily affect whether a jury finds the specific intent necessary for a first or second-degree murder verdict, or for certain capital murder verdicts. At the time of the request for an expert, Starr was facing charges of first-degree premeditated murder, second-degree murder, and capital felony murder. His intellectual understanding of his actions and their gravity was therefore clearly in issue at both phases of the proceedings.

previous mental health tests, which assigned Starr the mental age of a six or seven year old, because he was not familiar with the methodology of those tests. Nor could he explain what it meant, in either psychological or lay terms, for an adult male to have the mental age of seven. The state psychologist apologized, on the record, for his inability to meet the defense's needs. At best, he could explain that Starr was in the lower one percent of the population in intelligence and was obviously not a genius.[8] Thus we find that Starr was denied the appropriate examination to which due process entitled him.

b. Assistance in the Evaluation, Preparation, and Presentation of the Defense.

The trial court concluded that Starr's ability to subpoena the state examiners and to question them on the stand, coupled with the court's payment for their travel expenses from Little Rock, sufficed to provide Starr with the expert assistance to which he may have been entitled. We disagree. While due process admittedly does not give defendants the right to assistance from their experts of choice, it does give appropriate defendants the right to experts who will "assist in evaluation, preparation, and presentation of the defense." Ake, 470 U.S. at 83. Before Ake, the ability to subpoena and question a neutral expert on whose examination both the state and the defense were relying may have satisfied due process. See United States ex rel. Smith

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[8]We see no rational reason that a defendant be allowed an Ake expert only if the prosecution is relying on an opposing expert. Often, one party needs expert testimony to explain that conditions are other than they superficially seem to be, while the opposing party is content with the lay person's unaided assessment of the situations Without an expert who had performed an adequate exam, Starr was unable to address the prosecution's contention that "mild" retardation was essentially no retardation.

v. Baldi, 344 U.S. 561, 568 (1953) (due process satisfied when insanity defendant is examined by neutral psychiatrists on issue of insanity, and those experts testify). However, Ake expressly disavows the result in Smith and explains that the requirements of due process have fundamentally changed since that decision. Ake, 470 U.S. at 85.

Ake explains that Smith was decided before the Supreme Court had found that the Constitution afforded indigent defendants in state court the right to appointed counsel, much less appointed experts. Smith was also decided before expert testimony became so pivotal to litigation that, in appropriate cases, experts must be considered to be basic tools necessary for an adequate defense. Ake, 470 U.S. at 77, 79-82. Thus, the Court explains that its disagreement with Smith is "fundamental." Id. at 85.

Like appointed counsel, experts appointed under Ake are to aid the defendant and function as a "basic tool" in his or her defense. Id. at 77. To so function, they must be available to 'assist in evaluation, preparation, and presentation of the defense." Id. at 83. Such availability and assistance requires more than permission to subpoena an expert and question him or her on the stand.

3. Harmless Error

Having decided that the trial court erred in not appointing an Ake expert, we must consider whether harmless error analysis is appropriate, and if so, which analysis applies.

Harmless error inquiry has been applied to numerous constitutional mistakes. Chapman v. California, 386 U.S. 18, 22 (1967). Certain structural errors however, can never be harmless. See Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991). Our cases have, at least implicitly, applied a harmless error analysis to Ake type errors. Little, 835 F.2d at 1245 (reversing where denial of expert probably

had material impact on trial). Despite the late Justice Marshall's contrary opinion, Vickers v. Arizona, 497 U.S. 1033, 1037 (1990) (Marshall, J., dissenting to denial of certiorari), we believe that the inferential holding in Little is correct and that the denial of an Ake expert is the sort of constitutional omission that is subject to harmless error analysis.

Mistakes which have been regarded as so elemental that their existence abrogates the basic structure of a constitutional trial, and which are therefore not subject to harmless error analysis, include the deprivation of the right to counsel, trial by a biased judge, exclusion of members of the defendants' race from the grand jury, deprivation of the right to self-representation, and denial of the right to a public trial. Fulminante, 499 U.S. at 309-10. Thus, the issue becomes whether the denial of an Ake expert is a defect abrogating the constitutional structure of a trial or mere trial error. We think it is trial error.

Despite Ake's explanation that experts are a basic tool of an adequate defense, analogous to appointed counsel, we note that the denial of an appropriate expert is not parallel to the deprivation of the right to counsel. A defendant has no burden to meet to invoke the right to counsel. Ake, however, requires a defendant to make a threshold showing of the relevance and the helpfulness of the expert services. We do not believe that a right to which a defendant is not entitled absent some threshold showing can fairly be defined as basic to the structure of a constitutional trial.

We find that the denial of an Ake expert is more analogous to the situation where counsel has performed deficiently, than to the situation where the right to counsel has been denied altogether. Like deficient performance of counsel, the denial of an Ake expert deprives the defendant of a tool basic to the preparation of his defense, but circumstances may render the lack of that tool a mere inconvenience, rather than a total disability, and prejudice may not result. For ex-

ample, in Coulter, 804 S.W.2d at 357, the lack of a court-appointed expert did not prejudice the defendant because counsel financed the expert from his own pocket. Because Ake error is trial error, and may result in no prejudice to the defendant, it is subject to harmless error analysis.

There are, however, two separate harmless error analyses for the denial of constitutional rights. The first, whether the error was harmless "beyond a reasonable doubt," is known as Chapman analysis. The second, whether the error "had substantial or injurious effect or influence in determining the jury's verdict," is the analysis now normally used on habeas review. Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993). Because state courts are required to apply Chapman analysis on direct review, it makes little sense to require federal habeas courts to engage in an identical analysis and thereby undermine the finality of state convictions which have survived direct review. Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993). In Orndorff, we addressed the question of which standard was appropriate, on habeas review, for constitutional error which the state courts have not had any opportunity to address. Id. We concluded that Brecht's reasoning was inapplicable in those situations, and that Chapman was the appropriate standard. Id.

In Starr's case, the state courts have had an opportunity to review the Ake problem, but found that there was no constitutional error. The question then becomes which standard of review is appropriate if the state courts had the opportunity to address the constitutional error under the Chapman standard but did not do so because they found that there was no error. This question was left open in Hoversten v. Iowa, 998 F.2d 614, 617 (8th Cir. 1993). Orndorff purported to

answer it, but because that case had a different posture, its answer is not controlling. We believe, however, that the reasoning in Orndorff applies equally to Starr's situation. Considering an issue and finding no error does not carry with it an implicit Chapman analysis,[9] and thus Brecht does not apply.

We now consider whether the Ake error was harmless beyond a reasonable doubt at either the guilt or sentencing phases. At the guilt phase Starr faced first-degree, second-degree, and capital murder charges. The state had the burden of showing premeditation for the first-degree charges, extreme indifference or knowing conduct for second-degree murder, and burglary or rape and extreme indifference in the capital murder charge.[10] Starr's retardation is relevant to

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[9]For example, a state court could find a confession admissible because it was not coerced. If the confession was later found to have been coerced, its admission could not be presumed to have been determined to be harmless beyond a reasonable doubt simply because the state court had considered the issue of admissibility. In fact, it would be unusual for such an error to be harmless beyond a reasonable doubt. Thus, absent an alternative holding that even if there was error, it was harmless beyond a reasonable doubt, we will apply the Chapman analysis.

[10]The capital murder charge was as follows:

David Lee Starr is charged with the offense of capital murder. To sustain this charge, the State must prove the following things beyond a reasonable doubt:

First: That David Lee Starr committed the crime of burglary or rape; and

Second: That in the course of and in furtherance of that crime, caused the death of Gladys Ford under circumstances manifesting an extreme indifference to the value of human life.

Trial Transcript at 1353.

his- level of premeditation and to whether he purposefully killed Mrs. Ford. However, the jury convicted him of capital murder, in which only burglary, rape, and extreme indifference are relevant. There is no question that Starr had the intent to steal from Mrs. Ford, or that he knew that he was raping her. Expert testimony as to his mental retardation would have been irrelevant to those issues. Further, whether or not Starr realized he had mortally injured Mrs. Ford is irrelevant to whether he was acting with extreme indifference to that possibility. There is no doubt that Starr knew he was seriously injuring Mrs. Ford, that he intentionally inflicted the injury to incapacitate her, and that he left her lying in a sea of blood without summoning help. Nothing an Ake expert could say would change those facts or change that showing of extreme indifference. Thus, while expert testimony might have helped Starr's case with respect to the first- and second-degree murder charges, such an expert could not have helped Starr on the capital charge. Since it was on the capital charges that Starr was convicted, we find that the Ake error in the guilt phase was harmless beyond a reasonable doubt.

The sentencing phase presents a different question. The prosecution, relying on the court-ordered examination, repeatedly emphasized that Starr's retardation was "mild" and did not prevent him from

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[11]The prosecution also made improper remarks to the jury in its closing argument at sentencing. The prosecutor told the jury that he had further evidence which he had not presented which would make them more inclined to impose the death penalty, and, having presented no evidence as to future dangerousness, argued that the death penalty was the only way to keep Starr from killing again. See Darden v. Wainwright, 477 U.S. 168, 180 (1986) (improper to argue that the death penalty is the only guarantee against future crimes). Although these improper arguments did not so infect the sentencing procedure with unfairness as to deprive Starr of due process, they do add to the infirmity of Starr's sentencing procedure.

knowing right and wrong. The prosecution argued[11] to the jury that because the state examination revealed Starr's ability to tell right from wrong, and his ability to conform his conduct to law, its concurrent finding that he was "mildly" retarded should not be considered a mitigating factor in sentencing. This argument highlighted the inappropriateness of the court-ordered examination, and exacerbated the resultant harm to Starr. In short, the entire sentencing phase turned on the effects of Starr's retardation on his perception and understanding of the cruelty and gravity of his acts, the issue for which he was denied an Ake expert. Thus, we cannot find the error at sentencing to be harmless beyond a reasonable doubt.[12] Further, as the above discussion of the prejudice to Starr makes abundantly clear, the error would not be harmless even were we applying the less stringent Brecht standard of review.

C. OTHER ISSUES

Starr raises a number of other issues which we have carefully examined and find to be without merit. These issues include: a number of other allegations of ineffective assistance of counsel; a contention that the district court erred in denying an evidentiary hearing on Starr's allegation that his arrest was illegal; and a contention that the district court erred in finding Starr's confession to be voluntary.

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[12]Further indicia of the probable value of Axe expert testimony is that even without the benefit of such testimony, the jury seriously considered life without parole, as evidenced by its question to the judge as to whether Starr could be paroled if he received that sentence. The trial judge refused to answer the question, other than to refer the jury back to their instructions. The question of whether a death penalty jury must be instructed on the exact meaning of life without parole in order to carry out their constitutional function is now pending before the Supreme Court. State v. Simmons, 427 S.E.2d 175 (S.C.) cert. granted 114 S. Ct. 57 (1993).

First, we address the ineffectiveness claims. We find that counsels' request of a first-degree premeditated murder charge, rather than a first-degree felony murder charge, to be the sort of strategic decision we will not second-guess in hindsight. We find that our grant of the writ renders moot Starr's claim that counsels' failure to request clarification of the jury's findings on mitigation was ineffective assistance. [13] We also find that the question of counsels' failure to object to the prosecution's improper remarks at sentencing to be moot, as well as being another strategic decision which we would not second guess.

Counsels' decision not to request instructions on diminished capacity or manslaughter in the guilt phase is also a strategic decision which dovetails with their strategic decision not to present either opening or closing arguments during that phase. Counsels' evident strategy was to put the state to its proof, and to save all their credibility for the sentencing phase. The record reveals that counsel fought tena-

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[13]This claim of ineffectiveness is probably procedurally barred, but the confused state of the jury forms as to mitigating circumstances does further highlight the prejudice of the Ake error. The jury checked that they unanimously found mitigating circumstances to exist, but failed to indicate which ones. The jury failed to check the form by which they were to acknowledge the presentation of evidence as to any given mitigating circumstance, even if they were not convinced of its existence and did check the form indicating that there was no evidence of any mitigating circumstance presented. Retardation is evidence of a mitigating mental defect. See Penry, 492 U.S. at 302 (mild retardation is mitigating evidence which must be considered). A sentencer may not refuse at least to consider mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393 (1987). Therefore, the jury should not have refused to acknowledge that Starr presented evidence as to retardation, even if they were not convinced that such evidence established the existence of the mental defect mitigating circumstance.

ciously to exclude Starr's confessions, Mrs. Ford's pistol, and gruesome crime scene photos. Having lost those fights, counsel decided to reserve their ammunition for the sentencing phase, as evidenced by their eventual arguments to the jury. This may have been an unsuccessful, or even reckless strategy, but faced with overwhelming evidence of the brutal rape and murder of an elderly woman, we cannot say such a strategy amounts to ineffective assistance. Starr's further argument that counsel was ineffective in the timing of his motion to suppress Mrs. Ford's gun which was seized when Starr was arrested is simply meritless.

Starr's complaint regarding the district court's treatment of his allegation of an illegal arrest is also meritless. He received a full and fair hearing in the state court, which decided that despite a technically defective warrant, Starr's arrest fell within the Leon good faith exception. Therefore, as the state correctly argues, he may not raise this issue in habeas proceedings. Stone v. Powell, 428 U.S. 465 (1976).

Finally, Starr claims that his confessions should have been suppressed as being involuntary because of his retardation and because of subtle coercion. We review questions of voluntariness de novo. Fulminante, 499 U.S. at 287. Viewing the totality of circumstances, we find Starr's confessions to have been voluntary. Id. at 286. Starr was arrested early in the morning. After receiving a Miranda warning, he denied any knowledge of Mrs. Ford's murders He initialed and signed the Miranda warning form. Later, he twice initiated conversations with the police and was given Miranda warnings each time. The record shows that the officers were unfailingly polite and respectful in dealing with Starr. There is simply no objective evidence of coercion in this record, subtle or otherwise.

Starr also claims that his waiver of Miranda rights could not be knowing and voluntary because he could not understand those rights. However, the police were very calm and deliberate in their question-

ing of Starr. They gave him Miranda warnings each time they spoke with him. Starr represented to them that he did understand and waive his rights. His responses to questions were lucid, appropriate, and reflected complete understanding of what was said to him. In view of the record of Starr's conversations with police, his assertion that he did not understand his rights is not credible.

III . CONCLUSION

Because Starr's sentence is based on the consideration of an invalid sentencing factor, and because he was denied the aid of an Ake expert to assist him in evaluating, preparing, and presenting his retardation as a mitigating circumstance, we reverse and remand to the district court with instructions to issue the writ granting Starr habeas corpus relief. The writ should give the state the option of conducting a new sentencing proceeding or reducing Starr's sentence to life without parole.

McMILLIAN, Circuit Judge, specially concurring.

I agree that the writ of habeas corpus should be granted. I write separately because I would hold that errors under Ake v. Oklahoma, 470 U.S. 68 (1985) (Ake), are per se reversible, and thus do not require a showing of prejudice. In Ake, the Supreme Court held that the state must appoint a psychiatric expert for a criminal defendant if the defendant can show that his or her sanity will be a "significant" issue at trial. Id. at 83. The Court reversed and remanded after it found that the defendant had met the above standard and had not been provided the necessary expert. Id. at 8687. The Court did not examine whether the lack of the expert had prejudiced the defendant.

The majority's opinion concludes that the denial of the Ake right cannot be a fundamental error under the Supreme Court's standard in Arizona v. Fulminante, 499 U.S. 279, 310 (1991). The Supreme

Court's holding in Ake, however, is based on a determination that the denial of the psychiatric expert, when the defendant meets the threshold test, creates an extremely high probability of an erroneous factual determination. 470 U.S. at 824. In my view, an error which creates an extremely high probability of an erroneous resolution of a "significant" issue certainly strikes at the structural framework of the proceeding. See Arizona v. Fulminante, 499 U.S. at 310.

Moreover, Justice Marshall, the author of Ake, dissenting from the Courts denial of certiorari in Vickers v. Arizona, 497 U.S. 1033, 1037 (1990) (citations omitted), explained that Ake did not set out a prejudice requirement:

> [The reasoning of the Arizona Supreme court] wrongly subjects Ake claims to harmless-error analysis. In Ake, we did not endeavor to determine whether the petitioner's case had been prejudiced by the lack of a psychiatrist. Rather, we determined that, in general, psychiatric assistance is of extreme importance in cases involving an insanity defense, and that without that assistance "the risk of an inaccurate resolution of sanity issues is extremely high." Because the petitioner had made the threshold showing that his sanity was a significant issue at trial and the State had failed to offer psychiatric assistance, we reversed and remanded for a new trial.

Finally, I do not read Little v. Armontrout, 835 F.2d 1240 (1987) (en banc), cert. denied, 487 U.S. 1210 (1988), to apply harmless-error analysis to an Ake claim. In that case this court concluded that an expert was required under Ake to help the defendant address identification testimony obtained through hypnosis. 835 F.2d at 1244-45. I read the sentence cited at page 18 of the court's opinion as addressing whether the defendant had satisfied the threshold standard for appointment of an expert.

Accordingly, I would hold that an Ake error does not require a showing of prejudice.

A true copy.

Attest: CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1466EAPB

David Lee Starr,
Appellant,

vs.

A. L. Lockhart, Director, Arkansas Department of Correction,
Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en bane is denied. Judge Fagg, Judge Bowman, and Judge Loken would grant the suggestion. The petition for rehearing by the panel is also denied.

June 10, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

DAVID LEE STARR PETITIONER

vs. NO. PB-C-90-186

A. L. LOCKHART, Director,
Arkansas Department of Correction RESPONDENT

MEMORANDUM AND ORDER

On the morning of June 11, 1985, petitioner raped and murdered Gladys Ford, a seventy-six year old woman. In his habeas petition, petitioner asks this court to set aside his conviction and death sentence. While petitioner has raised numerous issues in his petition, the court finds none of them to be with merit and the requested relief is denied.

The evidence of petitioner's guilt is, in a word, overwhelming. The details of Mrs. Ford's death are not for the weak of stomach. [1] However, reference to those details must be made to demonstrate the overwhelming proof of petitioner's guilt. That is important because, when proof of guilt is as great as it is here, the degree of prejudice petitioner must demonstrate from any error is likewise great. Chapman v. California, 386 U.S. 18 (1967); Milton v. Wainwright, 407 U.S. 371 (1972).

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[1] State's exhibits 77, 80 and 81, the photographs showing the condition of Mrs. Ford's body, while horrifying to view, eloquently, if shockingly, demonstrate the brutality of petitioner's attack upon her.

Somewhere between 7:00 a.m. and 8:00 a.m. on June 11, 1985, petitioner came to Gladys Ford's home in Marvell, Arkansas for the purpose of committing a theft. At the time that petitioner arrived at Mrs. Ford's house, she was sweeping her sidewalk. Petitioner withdrew an iron pipe from the ground, which was one of four used to hold a garbage barrel in place (see State's exhibit 9). Petitioner then hid in a storage room or shed which was attached to the carport. When Mrs. Ford approached, he struck her with the pipe with such force that it caused the skull cap to fracture in five places and the mid-brain to separate (T. 1133-34). Petitioner described this crushing blow in his second [2]confession as ". . . pop[ping] her up beside the head. . ." (T. 1273). Petitioner then dragged Mrs. Ford, unconscious but still alive, into the house, leaving a large trail of blood (T. 1273-74, 1118, 1195-96). When petitioner got Mrs. Ford in the house, he delivered another crushing blow to her head with the iron pipe, or, as petitioner put it, "I took her in the house and popped her again. . ." (T. 1274). Petitioner then went through every room in the house looking for things to steal, but the only thing he found that he thought worth stealing was a pistol, which he took (T. 1275-76). Next, petitioner dragged Mrs. Ford still barely alive, into her bedroom, threw a sheet over her face, pulled her underwear to one side, and raped her (T. 1277-78). While he was in the bedroom, he left his palm print on the bed by her body (T. 1169), which was later identified by an expert in print comparisons (T. 1150-51). Then, he hid the murder weapon behind a dresser in the hallway of Mrs. Ford's house (T. 1280). He went out of Mrs. Ford's house through a window (T. 1279). Police found the gun stolen from Mrs. Ford behind a couch at petitioner's sister's house where petitioner was later arrested (T. 1123).

As the court noted earlier, there can be no doubt as to the fact of petitioner's guilt. Among the evidence linking him to the crime were

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[2]In petitioner's first confession, he attempted to blame the murder of Mrs. Ford on his girlfriend. (T. 1249-51).

his palm print, the pipe used as a murder weapon, the hiding place of which he showed the police, and the gun stolen from the Ford home hidden in his sister's house when he was arrested. Moreover, his second confession is entirely consistent with the facts of the case and could have only been given by someone who knew the details. For instance, his confession is consistent with (1) the fact that Mrs. Ford was hit twice, as the medical examiner testified (T. 1133-35; State's exhibits 77 and 80), (2) the description of the inside of the house, (3) the fact that Mrs. Ford's underwear had not been removed, (4) physical evidence of someone leaving through the window he identified and, (5) as indicated earlier, the whereabouts of the murder weapon's hiding place.

I.

The first ground of relief in petitioner's attack on his conviction is based on his claim of ineffective assistance of counsel. For the most part, petitioner's complaints are mere second guessing and hindsight-aided criticism. Indeed, in reading the record of the proceedings in this action, the court was struck with the courageous effort of the defendant's attorneys. For instance, over two weeks were spent in picking the jury. While that might not be unusual in some states such as California, by Arkansas' standards, that is an unusually long time spent in voir dire. Indeed as the prosecutor remarked, it was probably the most time that had ever been spent picking a jury in Phillips County (T. 1112). In short, petitioner's attorneys were faced with the burden of the overwhelming evidence of guilt of petitioner's brutal crime. Even if Daniel Webster, Clarence Darrow, and Edward Bennett Williams could have been brought back to this mortal life to represent petitioner at his trial, and armed with unlimited resources, it is impossible for the court to see how it would have made any difference in the outcome, either as to conviction or sentence. Nonetheless, the court will review each of petitioner's points in his claim of ineffective assistance of counsel.

I(A)

First, petitioner complains that his counsel failed to pursue a change of venue. Ark. Code Ann. § 16-88-201 provides for the removal of a criminal case to the circuit court of another county when the "minds of the inhabitants of a county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein." It would have been petitioner's burden to prove such a condition existed. As the Supreme Court noted in Patton v. Yount, 467 U.S. 1025, 1035 (1984), "The relevant question is not whether the community remembered the case, but whether the jurors . . . at trial had such fixed opinions that they could not judge impartially the guilt of the defendant."

The jurors seated in this case[3] were, as noted in the previous paragraph, subjected to intense voir dire examination which is reflected in pages 231 through 1026 of the trial transcript (T. 231-1026). On pages 8 through 15 of respondent's response brief to the petition of writ of habeas corpus, respondent demonstrates in detail that the voir dire procedures produced twelve fair and impartial jurors. Thus, it cannot be said that respondent [sic] was prejudiced in any way by the failure of his attorneys to ask for change of venue. Moreover, it is clear from the totality of facts revealed in the two weeks of voir dire proceedings that if such a motion had been made, it would probably have been denied, and correctly so by the trial judge. In sum, this contention is without merit.

I(B)

Next, petitioner argues that his counsel waived both opening and

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[3]John King, Kenneth Davis, Linda Bowers, Carol Adkinson, Albert Travis, Billy Mullally, Clara McGehee, George Gates, Bobby Dale Brown, Nancee James, Sandra Spain, and Betty Mallard.

closing arguments in the guilt phase of the trial. In making this complaint, petitioner is second guessing a trial tactic. In this case, it was a very plausible trial tactic and it should not be second guessed by this court. Christian v. Housewright, 721 F.2d 240 (8th Cir. 1983); Parker v. Parratt, 662 F.2d 479 (8th Cir. 1981), cert. denied, 459 U.S. 846 (1982). Indeed, even in hindsight, plausibility of this trial tactic is apparent. With the overwhelming proof of petitioner's guilt of this brutal crime, his attorneys were obviously trying to salvage what they could, to wit, his life. Although ultimately unsuccessful in that effort, their attempt to avoid angering the jurors any more than they would be when they heard the evidence, makes as much sense now as it did then. The court cannot speak any more eloquently to the wisdom of this tactic than petitioner's counsel did himself when addressing the jury during the penalty phase of the trial.

> I knew that when this thing started, I knew what you know now. To get up here and tell you that this man was innocent would cause me a loss of face with you. But, today, when the question of life and death of this defendant is in the balance, now is the time to speak. (T. 1405).

This particular claim of ineffective assistance of counsel is without merit.

I(C)

Petitioner's next contention was that counsel was ineffective for failing to object to an erroneous jury instruction. The allegation is mentioned twice in the petition. Petitioner later withdrew this issue in a pre-hearing brief filed on April 11, 1991, noting that it had been raised in error.

I(D)

Next, petitioner alleged that counsel failed to file a pretrial motion to suppress a gun seized at the home of one of petitioner's sisters. The issue surrounding the use of the gun at trial is whether or not there was a possible fourth amendment violation, and, if so, did petitioner have standing to raise the issue in view of the fact that the search occurred at his sister's home. Petitioner argues that counsel should have complied with Ark. R. Crim. P. 16.2 by filing a pre-trial motion to suppress evidence, requiring a pre-trial hearing, and objecting to the warrantless search of the house.

Following Rakas v. Illinois, 439 U.S. 128 (1979), the Arkansas Supreme Court found that the trial judge correctly ruled that petitioner had no standing to object to the warrantless search of his sister's home. See Starr v. State, 297 Ark. 26, 759 S.W.2d 535 (1988). Petitioner argues now that if his attorney had been familiar with the Rakas case and the Arkansas Rules of Criminal Procedures, he would have filed a timely motion to suppress, interviewed the sister, and had the sister testify to petitioner's frequent guest status at the home to determine standing. Presumably, petitioner contends, the Arkansas Supreme Court would had ruled differently had the record contained the sister's additional testimony.

The respondent first argues that under Rakas, petitioner didn't have standing. Further, respondent contends that petitioner cannot demonstrate how he was prejudiced by his counsel's failure to file the motion to suppress as counsel cannot be ineffective for failing to pursue a meritless claim.

Fourth amendment challenges to a state conviction are not cogni-

zable in federal habeas proceedings where petitioner had an opportunity for full and fair litigation of the claim at the state level. Petitioner does not claim here that he was denied such an opportunity, only that his counsel failed to take advantage of it by filing a motion to suppress. Thus, the fourth amendment issue comes up only in the context of ineffective assistance of counsel, a sixth amendment claim. Petitioner is permitted to raise the issue in that context. Kimmelman v. Morrison, 477 U.S. 365, 38283 (1986).

It is clear that the fourth amendment ground is but one element of proof of the sixth amendment claim. But the fourth amendment claim would have to have been meritorious, if failure to litigate were to constitute ineffective assistance. Id. at 375. The Arkansas Supreme Court found that the trial judge was correct under Rakas, in ruling that petitioner had no standing to object to the warrantless search of his sister's home. Starr v. State, 297 Ark. 26, 759 S.W.2d 535 (1988). It is true, however, that the Arkansas Supreme Court made that decision without the benefit of the evidence petitioner now says would have been, or might have been, available had counsel properly explored this claim in conjunction with a motion to suppress.

Based on the evidence in the record, it is doubtful that petitioner could establish standing to object to the search of his sister's home. Under 28 U.S.C. § 2254 (d), the District Court must accord a presumption of correctness to a state court's findings of fact from a hearing in which petitioner was a party. Woods v. Armontrout, 787 F.2d 310, 312-13 (8th Cir. 1986), cert. denied, 479 U.S. 1030 (1987). The state court found that petitioner lacked standing (T. 1188).

This court cannot finally decide whether or not petitioner had standing to object to the search without hearing whatever additional

evidence might have been put on at the time. However, the court finds that an evidentiary hearing is not required on this issue. Even if petitioner had standing to raise the issue, the claim would have been ultimately rejected. No fourth amendment violation occurred because the gun was obtained in an area within the immediate control of petitioner at the time of the arrest. Chimel v. California, 395 U.S. 752 (1969). The fact that petitioner was already in handcuffs at the time the gun was found does not necessarily preclude such a search. U.S. v. Lucas, 898 F.2d 606, 609 (8th Cir.), cert. denied, 111 S.Ct. 112 (1990). The shackles are not the determinative factor; "the question is whether, in light of all of the circumstances, the police conducted a valid search incident to [Petitioner's] arrest." Id.

When the police arrived at the house owned by one of petitioner's sisters they were met by two other sisters.[4] Officer Kathy Smith asked one of the two women if petitioner were in the house. Smith informed the women that the reason the officers were there was to find out if petitioner was in the house. One of the sisters opened the door, screamed, and ran backwards off the porch. The officers saw petitioner pass by a window at that time. When more help arrived, the officers persuaded petitioner to come out and he was taken into custody and handcuffed. Acting on information that petitioner had a weapon (T. 1289), Officer Smith entered the house, located the gun behind a couch, retrieved the gun and exited the house. (T. 1122-23).

In U.S. v. Queen, 847 F.2d 346 (7th Cir. 1988), the court ruled that a search was valid where the premises searched was the location from where the arrestee emerged immediately prior to his arrest. Id. at 354.

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[4]The court notes that if petitioner has standing to object to the search, it would follow that these siblings probably had standing to waive the warrant requirement, and apparently did.

The court in U.S. v. Queen relied on a significant number of cases that stressed the importance of protecting arresting officers no matter how remote the chance that a person just taken into custody might reach a weapon. See generally, Queen, supra and cases cited therein at 353-4.

In Kirkpatrick v. Butler, 870 F.2d 276 (5th Cir 1989), cert. denied, 110 S.Ct. 854 (1990), the court considered a case with remarkably similar facts to the instant case. There, the court found that while police officers may not always conduct a search of an arrestee merely as a search incident to an arrest, the search may be justified because of exigent circumstances as long as they have "some ground in reality." Id. at 282. A review of the cases cited in Kirkpatrick clearly demonstrate that such circumstances exist where the police have reason to suspect the presence of a weapon, or have no way of knowing if there are other persons present inside the residence who might present a security risk. Id. at 282. (citations omitted); see also U.S. v. Arcobasso, 882 F.2d 1304 (8th Cir. 1989).

The court concludes that even if petitioner had standing to challenge the search, his motion to suppress would have been denied. Therefore, petitioner was not prejudiced by counsel's decision to not file the motion, or by his negligence in not doing so if that were the case. Strickland v. Washington, 466 U.S. 668, 692 (1984).

I(E)

Petitioner has waived the next ground. Therefore, the court will not address the issue of whether counsel was ineffective for failing to object to an erroneous jury instruction.

I(F)

Next, petitioner claims that trial counsel failed to request an instruction of first degree murder. This ground was analyzed extensively by the state court. See Respondent's Exhibit B. A first degree murder instruction taken from Ark. Code Ann § 5-10-102(a)(2) (1987) was given at trial. That instruction contains elements of premeditation and deliberation unlike Ark. Code Ann. § 5-10-102(a)(1) (1987). Petitioner now contends that the latter statute should have been used because it tends to overlap with the capital murder statute, Ark. Code Ann. § 5-10-101(a)(1) and therefore § 5-10-102(a)(1) is a lesser included offense of § 5-10-101(a)(1).

The Arkansas Supreme Court recognized that a § 5-10-102(a)(1) instruction is required when a defendant is charged with § 5-10-101(a)(1), as was petitioner. Rhodes v. State, 290 Ark. 60, 716 S.W.2d 748 (1986). But in petitioner's case, the Arkansas Supreme Court also recognized that petitioner was not prejudiced by the trial court's failure to give the correct instruction and trial counsel's failure to request the correct instruction because the jury chose the maximum penalty of death over life without parole.

The court reasoned that the jury would not have been interested in the lesser charge punishable only by a maximum sentence of forty years or life. Petitioner argues that at the time the jury chose the offense of which to convict petitioner, they did not have the sentences before them.

The court finds that the reasoning of the Arkansas Supreme Court is valid even in light of petitioner's argument. The jury chose the maximum offense and penalty and, therefore, petitioner was not prejudiced by the omission of the proper instruction of first degree murder. The result or outcome would not have been different had counsel

requested the correct instruction. Petitioner was not prejudiced. The sixth amendment is therefore satisfied. Strickland v. Washington, 466 U.S. 668, 692 (1984).

I(G)

Petitioner next asserts that his counsel was ineffective for failing to request instructions on diminished capacity or manslaughter. Trial counsel did not request an instruction explaining the diminished capacity defense or one explaining that if the defendant caused Mrs. Ford's death while under the influence of extreme emotional disturbance, that might constitute the lesser included offense of manslaughter.

This argument must also fail. It relies on hindsight. The jury heard the mitigating evidence and did not need an instruction to explain a defense that was not asserted. According to petitioner, his trial counsel raised the issue of a diminished capacity defense during voir dire but not during the trial.

Counsel's choice to pursue that strategy falls within the wide range of discretion normally afforded trial counsel. There is a "strong presumption" that counsel's strategy and tactics fall "within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 689.

To look back now and decide that counsel should have relied on the diminished capacity issue more than he did is just the type of second guessing rejected in Strickland, supra. As for counsel's failure to obtain an instruction on manslaughter, petitioner was simply not prejudiced where the jury heard all of the mitigating evidence and still chose the maximum penalty available.

I(H)

Petitioner next asserts that trial counsel should have polled the jury following the guilty verdict. Petitioner does not state how he was prejudiced by this decision and concedes that it alone does not constitute ineffective assistance in violation of the sixth amendment. This court also fails to find any prejudice and, therefore, this ground must be rejected.

I(I)

The next issue raised is also the focus of petitioner's first motion for summary judgment (filed February 13, 1991 - document #18). Petitioner contends that counsel was ineffective for failing to object to two allegedly invalid aggravating circumstances.

The submission to the jury of pecuniary gain as an aggravating circumstance was found defective in Collins v. Lockhart, 754 F.2d 258 (8th Cir.), cert. denied, 474 U. S. 1013 (1985), but was later reexamined and approved in Perry v. Lockhart, 871 F.2d 1384, 139293 (8th Cir.), cert. denied. 110 S.Ct. 378 (1989). The court in Perry relied on the holding in Lowenfield v. Phelps, 484 U.S. 231 (1988), that the Eighth Amendment is not violated in a death penalty case if a single aggravating circumstance found by the jury was identical to an element of the capital murder offense at issue. Id.

Petitioner now argues that this court should hold counsel ineffective for failing to object to the pecuniary gain instruction because petitioner was convicted during the brief four year period that the holding in Collins had effect. The respondent argues that counsel was only ineffective if the Arkansas trial court would have independently agreed with the reasoning in Collins and decided to follow it. Re-

spondent has cited extensively from Lowenfield to demonstrate that Lowenfield was decided in reliance on two prior United States Supreme Court cases, Zant v. Stephens, 462 U.S. 862 (1983), and Jurek v. Texas, 428 U.S. 262 (1976), both decided prior to petitioner's trial. The respondent concedes that counsel was ineffective if it could be said with some certainty that the trial judge would have accepted the Eighth Circuit's reasoning in Collins. But this cannot be assumed, argues the respondent, because Collins proved to be a "lawless" decision by which the trial judge was not legally bound. The argument that Collins was a "lawless" decision was recently rejected in Fretwell v. Lockhart, 946 F.2d 571, 577 (8th Cir. 1991).

In Fretwell, the court held that the petitioner, Bobby Fretwell, was denied effective assistance of counsel because his attorney was unaware of the decision in Collins and failed to object to the pecuniary gain instruction. Fretwell v. Lockhart, 946 F.2d at 577. The court determined that Bobby Fretwell's attorney's performance fell below an objective standard of reasonableness because he violated his duty "be aware of all law relevant to Fretwell's death penalty case." Id. 946 F.2d at 573. Counsel's deficient performance, therefore, satisfied the first prong of the test set out in Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

The second prong of the Strickland test is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. 466 U.S. at 692. The court found that in Bobby Fretwell's case, the result of the proceeding would have been different. The error was prejudicial "because the jury found only one aggravating circumstance, that Fretwell had committed the murder for pecuniary gain." Fretwell, 946 F.2d at 573.

The instant case is distinguished from the Fretwell case because in

this case the jury found two aggravating circumstances. Even without the pecuniary gain aggravating circumstance the result of the proceeding would not have been different. The second aggravating circumstance, discussed infra, was later held violative of the Constitution in Maynard v. Cartwriaht, 486 U.S. 356 (1988). However, the rule promulgated in Maynard v. Cartwright, 486 U.S. 356 (1988), is a new rule of law not available to a habeas petitioner under Teague v. Lane, 489 U.S. 288 (1989). See Stringer v. Jackson, 909 F.2d 111 (1990); Smith v. Black, 904 F.2d 950 (5th Cir. 1990). Since the rule in Maynard is not to be applied retroactively, it had full force and effect at petitioner's 1986 trial for the murder of Gladys Ford. Even if counsel's error fell below an objective standard of reasonableness, petitioner was not prejudiced as he would have received the death penalty anyway because of the second aggravating circumstance.

The second aggravating circumstance instruction concerned whether Mrs. Ford's murder was especially heinous, atrocious, and cruel. Petitioner argues that the same aggravating circumstance was found too vague and broad to be sustained under the eighth and fourteenth amendments in Wilson v. State, 295 Ark. 682, 751 S.W.2d 734 (1988). Further, petitioner notes that an Oklahoma aggravating circumstance containing identical language was struck down in Maynard v. Cartwright, 486 U.S. 356 (1988).

Even though both the Arkansas case, Wilson, and the Supreme Court case, Maynard, were decided two years after petitioner's conviction, petitioner now argues that "[a]ny attorney familiar with capital cases" would have recognized that the Supreme Court would eventually disallow the "especially heinous, atrocious and cruel" aggravating circumstance, especially because the court relied so heavily on Godfrey v. Georgia, 446 U.S. 420 (1980), decided six years before petitioner was convicted. Petitioner claims counsel was ineffective for not anticipating the Supreme Court decision, and for not making the appro-

priate objection.

In petitioner's Rule 37 petition for postconviction relief, the Arkansas Supreme Court considered the same issue and decided that counsel was not ineffective for making the "novel" argument in 1986. The Arkansas Court also applied a "harmless error" analysis in finding that even if the "especially heinous, atrocious, or cruel" aggravating circumstance were struck down, the death sentence could stand on the "pecuniary gain" aggravating circumstance alone. Starr v. State, CR 87-20, slip op. at 5 (Ark. Sup. Ct. Nov. 13, 1989).

The rule promulgated in Maynard v. Cartwright, 486 U.S. 356 (1988), is a new rule of law not available to a habeas petitioner under Teaque v. Lane, 489 U.S. 288 (1989). See Stringer v. Jackson, 909 F.2d 111 (1990); Smith v. Black, 904 F.2d 950 (5th Cir. 1990). However, the issue here is not whether the rule should be applied retroactively, but whether counsel was ineffective for failing to make the same arguments that resulted in the decision in Maynard. The Court does not agree that counsel was ineffective for failing to formulate the ultimately successful argument in Maynard. Therefore, this ground for relief is rejected. Petitioner's first motion for summary judgment (filed February 13, 1991 - document #18) is denied.

I(J)

The next issue is that counsel failed to object to an invalid aggravating circumstance. This is a restatement of the last issue. The previous discussion and rulings will suffice.

I(K)

Petitionerts next assertion is that his trial counsel did not prepare or present a meaningful penalty phase at trial. Counsel is criticized

for not producing any witnesses from the Children's Colony, East Regional Mental Health Center, or any State facility at the penalty phase of the trial.

The respondent notes that three witnesses testified about petitioner's background. Evidence of mental retardation had been developed earlier in the guilt phase of the trial.

The court has thoroughly reviewed the entire trial record. The jury was unquestionably aware of petitioner's mental limitations. As stated by petitioner, his retardation was a mitigating circumstance that the jury was obliged to consider. Penry v. Lynaugh, 492 U.S. 302 (1989). But where there is evidence of mental retardation in the record and counsel is criticized merely for not putting on enough evidence, or for not putting on a different kind of witness, the criticism amounts to hindsight and second guessing. The allegations do not rise to the level of ineffective assistance.

I(L)

Petitioner's next ground for habeas relief is that counsel was ineffective for failing to object or move for mistrial following an objectionable closing argument by the prosecuting attorney during the penalty phase of the trial. The prosecutor made several unfortunate statements at the beginning of his closing argument which were apparently intended to lead the jury to believe that there was additional evidence, possibly even more incriminating, that the prosecution had decided to leave out of the case because they believed the jury already understood the facts (T. 1399-1400). The prosecutor also insinuated that petitioner was likely to kill again (T. 1420).

To violate the due process provision of the fourteenth amendment, the trial development in question must cause a fundamentally unfair

proceeding. Darden v. Wainwright, 477 U.S. 168 (1986). The prosecutor's remarks were improper but because of the overwhelming evidence against petitioner in the record, it cannot be said that the remarks resulted in a fundamentally unfair proceeding. Therefore, this ground is rejected as a fourteenth amendment violation.

As to ineffective assistance, the court must ask whether the result of the proceeding would have been different if counsel had objected to the comments. Strickland v. Washington, 466 U.S. 668, 692 (1984). The outcome of this trial would have been the same no matter how counsel responded to the prosecutor's comments. The ground must fail.

I(M)

Next, petitioner alleges that counsel was ineffective for failing to submit a jury instruction defining mitigation. Petitioner speculates that the jury may not have understood the term "mitigation". Here, petitioner is speculating in hindsight about what the jury may or may not have understood. The respondent notes that the jury was even given examples of mitigating circumstances. This ground does not rise to the level of ineffective assistance.

I(N)

Petitioner next contends that trial counsel should have asserted an objection to the imposition of the death penalty on a mentally retarded person. Petitioner concedes that this issue has been decided against him in Penry v. Lynaugh, 492 U.S. 302 (1989).

I(O)

The last allegation of ineffective assistance of counsel concerns

counsel's representation of petitioner on appeal. Petitioner has a right to effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387 (1985). The court finds no prejudice resulting from counsel's failure to preserve and pursue on appeal the various issues now offered by petitioner. Therefore, counsel was not ineffective for failing to raise those claims on appeal. See Thompson v. Lynaugh, 821 F.2d 1054, 1063 (5th Cir.), cert. denied, 483 U.S. 1035 (1987).

II

Having reviewed each of petitioner's separate allegations of ineffective assistance of counsel, the court shall move on to petitioner's second ground for relief, a fourth amendment claim. In Stone v. Powell, 428 U.S. 465 (1976), the Supreme Court limited the scope of federal habeas review of fourth amendment violations.

The court held that a state prisoner is not entitled to habeas relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial as long as the state provided an opportunity for full and fair litigation of the claim. Id. at 481-82.

Petitioner claims that he was arrested in violation of the fourth amendment because the arrest warrant was signed only by the Municipal Court Clerk and not a judicial officer. There was nothing attached to the warrant in the form of an information, affidavit, or indictment. Petitioner claims that his arrest violated the fourth and fourteenth amendments because the warrant was defective and there was no independent probable cause for the arrest.

The Arkansas Supreme Court examined this fourth amendment issue in Starr v. State, 297 Ark. at 32, 759 S.W.2d at 535. The majority held, in a four to three decision, that the "good faith exception" dis-

cussed in U.S. v. Leon, 468 U.S. 897 (1984), excused the warrant's defects because the police officers acted in good faith. The officers had always followed the same procedure used here, and had no ability to foresee the decision in Fairchild v. Lockhart, 675 F.Supp. 469 (E.D. Ark. 1987), which condemned the practice of a clerk issuing a warrant at the direction of the court.

Petitioner agrees that this is a fourth amendment issue and also concedes that most federal courts would preclude consideration of the ground in light of the holding in Stone v. Powell.

Petitioner urges this court to follow a line of cases in which federal courts have elected to second guess state court rulings on fourth amendment claims. See Gamble v. Oklahoma, 583 F.2d 1161 (10th Cir. 1978).

Stone v. Powell only requires that the defendant be afforded a full and fair opportunity to litigate his fourth amendment claim. In this case, the state's highest court considered the issue and the majority opinion came on a narrow vote. Certainly the state court gave the matter full consideration, as demonstrated by the close vote. The ruling went against petitioner, but petitioner was afforded a full and fair opportunity to litigate his fourth amendment claim. Under Stone v. Powell, this court should not now reconsider the fourth amendment claim.

III

Petitioner's third claim for relief concerns the trial court's failure to exclude petitioner's confessions because they were involuntary. Petitioner contends the confessions were involuntary because of his inability to understand the Miranda warning read to him by the ar-

resting officers. Petitioner also points to the hours of arrest and questioning as possible sources of "subtle coercion."

The court is not persuaded by petitioner's argument that his lack of intelligence or his fatigue constituted coercion. The state court found no coercion and also found that petitioner understood his rights. Though state court findings of fact are normally binding on the federal court, Woods v. Armontrout, 787 F.2d 310, 312-13 (8th Cir. 1986), cert. denied, 479 U.S. 1036 (1987), "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." Arizona v. Fulminante, 111 S.Ct. 1246, 1252, 113 L.Ed.2d 302 (1991)(citations omitted).

But, Fulminante also holds that a "harmless error" analysis may be applied to an involuntary confession. Id. at 1251.

This court is ever mindful that it "must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence." Id. at 1266 (Kennedy, J., concurring in judgment). Next to a videotape of the crime itself, a confession is the greatest and most damaging evidence against a criminal defendant.

The court finds that petitioner's mental inadequacies combined with the hours of interrogation did not combine to make his confession involuntary. Even if the confession were involuntary, however, the court finds that the error was harmless due to the other evidence of petitioner's guilt which was overwhelming. See generally, Arizona v. Fulminante, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) .

IV

Petitioner's fourth ground for habeas relief is that because he was an indigent, the court should have provided him with a psychiatric examination independent of the ones performed by the experts at the state hospital. The additional examinations would have been used to present additional mitigating evidence.

The respondent has raised the procedural bar to this specific ground, noting that it was not argued at the state court level. Petitioner disputes the bar, claiming that he requested more psychiatrists several times in the record. The Arkansas Supreme Court has a stated policy in death cases of examining the record for other errors than those specifically raised on appeal. In petitioner's case they found none. Starr v. State, 297 Ark. at 36, 759 S.W.2d at 540. Petitioner argues that the ground was impliedly considered by the Arkansas court because they claimed to have considered the entire record and must have noted that the trial court rejected his requests for further psychiatric evaluation.

Where the underlying ground requires less analysis than unraveling a procedural bar claim through the "cause and prejudice" analysis, a federal court should ignore the bar and rule on the underlying ground. The court has little trouble finding that by making competent psychiatrists from the state hospital available to petitioner, the standards and requirements of Ake v. Oklahoma, 470 U.S. 68 (1985), have been met. A complete reading of this record leaves no doubt that the jury was well apprised of petitioner's mental condition. Further analysis by additional doctors might have been interesting, but would not have materially changed the jury's understanding of petitioner's mental retardation.

V

Petitioner's fifth ground for relief is that the death sentence imposed in his case violates the Constitution because the jury based its death sentence in part on an impermissible aggravating circumstance. This ground is also the subject of petitioner's first motion for summary judgment which was denied, supra. That analysis will suffice. The ground is without merit.

VI

Petitioner's sixth ground is that the sentencing jury refused to consider relevant mitigating evidence in reaching the death penalty. This is more or less the subject of petitioner's second motion for summary judgment filed on February 13, 1991. There, the issue is dealt with in the context of ineffective assistance of counsel. Petitioner did not raise this ground at the state level in his direct appeal.

In a later state court petition for postconviction relief pursuant to Ark. R. Crim. P. 37, petitioner attempted to raise the ground. The state court refused to consider the ground under Rule 37 because it was essentially a challenge to the sufficiency of the evidence, only cognizable on direct appeal. This procedural rule is one regularly and consistently enforced by the state court, so it is the type of procedural default that would preclude raising the claim in a federal petition. Johnson v. Mississippi, 486 U.S. 578, 587 (1988). Without a showing of cause for the procedural default and prejudice attributable thereto, petitioner may not raise the ground in federal court. Murray v. Carrier, 477 U.S. 478 (1986).

Petitioner claims that counsel failed to raise the issue on appeal.

Attorney error or oversight does not constitute cause unless the oversight rises to the level of ineffective assistance of counsel in violation of the sixth amendment. Coleman v. Thompson, 111 S.Ct. 2546, 2566 (1991). The prejudice resulting from counsel's failure to argue on appeal that the jury did not properly consider mitigation is not clear. Counsel's decision to not pursue the conflicting jury forms falls within the "wide range of reasonable professional assistance" as discussed in Strickland v. Washington, 466 U.S. 668, 689 (1984).

Therefore, the court finds that petitioner has failed to demonstrate the requisite cause and prejudice to overcome the procedural bar to this claim. Due to the procedural default, the court shall not consider the merits of ground six.

VII

Petitioner's seventh ground for relief is that the Arkansas death penalty statute penalty phase provisions are unconstitutionally mandatory in nature. Ark. Code Ann. § 5-4-602 provides that the jury "shall impose a sentence of death" (emphasis added) if it finds aggravating circumstances, if those circumstances outweigh all mitigating circumstances, and if those aggravating circumstances justify a sentence of death. Petitioner argues that the language and implementation of the statute eliminate a jury's opportunity to show mercy to a particular defendant. In the process, the jury weighs aggravation against mitigation. That weighing process is analogous to "showing mercy." What factors other than mitigating evidence, we might ask, justify mercy? Moreover, the jury is ultimately asked if the aggravating circumstances justify the death penalty. Only if the jury finds that the aggravation outweighs the mitigation and that the aggravation justifies death can the verdict be death. Petitioner's argument is without merit.

VIII

The eighth ground is an eighth amendment challenge to the practice of executing retarded people. The claim is procedurally barred, and the substantive issue has been decided against petitioner, as he concedes, in Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

IX

The ninth ground for relief is a return to the issue of using pecuniary gain as an aggravating circumstance. This issue was discussed, supra, in the context of the sixth amendment. The law in the Eighth Circuit concerning this issue is clarified in Perry v. Lockhart, 871 F.2d 1384 (1989). It is clear that the ground must fail. The use of "pecuniary gain" as an aggravating circumstance does not violate the Constitution, even where "pecuniary gain" is an element of the underlying felony. Id.

X, XI, & XII

Petitioner abandoned grounds ten and eleven. Ground twelve is that the trial court should have instructed the jury that it was not required to impose the death penalty. The verdict forms adequately explained what the jury was required to do. The ground is without merit.

XIII

Petitioner's thirteenth ground for relief is that his death sentence should have been reexamined in light of the holding in Johnson v. Mississippi, 486 U.S. 578 (1988), that a death conviction should be

reexamined where it is based in part on a constitutionally impermissible aggravating circumstance. The jury in petitioner's case found two aggravating circumstances. First, the jury found that petitioner murdered for pecuniary gain. Second, his crime was committed in an especially heinous, atrocious or cruel manner. The U.S. Supreme Court has since rejected the latter circumstance as unconstitutionally vague. Maynard v. Cartwriaht, 486 U.S. 356, 108 S.Ct. 1853 (1988). The rule promulgated in Maynard v. Cartwriaht, 486 U.S. 356 (1988), is a new rule of law not available to a habeas petitioner under Teague v. Lane, 489 U.S. 288 (1989). See Stringer v. Jackson, 909 F.2d 111 (1990); Smith v. Black, 904 F.2d 950 (5th Cir. 1990).

The respondent first notes that this ground is most likely procedurally barred and the court agrees. Second, respondent quotes from Clemons v. Mississippi, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), where the court considered an identical case and held that the matter could be cured in one of two ways. The state court can either reweigh the aggravating circumstances versus the mitigating circumstances or may apply a "harmless error review." Id. The Arkansas Court chose the latter course. The ground is without merit. See Respondent's exhibit C at 5.

Amendment I & II

Petitioner amended his petition, adding two new grounds. First, petitioner raises the question of the consistency of the verdict forms. The second amended ground is that counsel was ineffective for failing to object to the allegedly inconsistent verdict forms. Petitioner claims that the state of the verdict forms rendered his sentencing arbitrary and capricious in violation of Furman v. Georaia, 408 U.S. 238 (1972).

Neither of these claims have ever been presented to the state court. They are being raised for the first time in this federal habeas petition. The court finds that petitioner has failed to present a set of facts or circumstances that might constitute cause and predjudice and would excuse the default. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Although it does appear that the jury was unable to properly fill out the forms according to design (T. 6975), and that counsel made no objection (T. 1430), it is abundantly clear that the jury found that the aggravating circumstances outweighed any mitigation and therefore imposed the death penalty. In view of the overwhelming evidence of guilt, the court could not find that petitioner is actually innocent and excuse the procedural default for that reason. Smith v. Murray, 477 U.S. 527, 538-39 (1986). Therefore, due to the procedural default, the court will not consider the merits of the amended grounds.

CONCLUSION

As the court noted at the beginning of this Memorandum and Order, it has thoroughly reviewed the transcript of petitioner's trial and is convinced to a moral certainty that the evidence is overwhelming and demonstrates beyond any reasonable doubt that petitioner was guilty of the rape and murder of Gladys Ford. In saying this, the court is not unappreciative of the excellent and professional manner in which petitioner's appointed attorney has vigorously represented petitioner in this habeas matter. However, when all the facts and controlling authorities are considered and weighed, it is clear that petitioner's claims for habeas corpus relief lack merit and his petition must, therefore, be denied.

In summary, the following motions are hereby denied:

Motion for an evidentiary hearing (doc. # 16);

Motion for summary judgment (doc. # 17);

Motion for summary judgment (doc. # 20);

Motion for appointment of a psychological expert (doc. # 36);

It is, therefore, considered ORDERED and ADJUDGED that the petition for writ of habeas corpus be, and the same hereby is, denied and judgment denying relief will be entered in accordance herewith.

IT IS SO ORDERED this 24th day of January, 1992.

Stephen M. Reasoner
/s/
United States District Judge
C-27

David Lee STARR v. STATE of Arkansas

CR 87-20 297 Ark. 26, 759 S.E. 535

Supreme Court of Arkansas

Opionion delivered November 7, 1988
[Reheading denied December 12, 1988]

DARRELL HICKMAN, Justice. David Lee Starr was sentenced to death for the murder of Mrs. Gladys Ford of Marvell, Arkansas- Mrs. Ford, age 76, was killed at her home on June 11, 1984. Starr made three detailed statements, finally admitting that he killed Mrs. Ford. There was also other evidence connecting him to the crime.

The main question raised is whether Starr's arrest was legal and whether the exclusionary rule should be applied in this case. The trial court held that the police officers acted in good faith in arresting Starr. We agree and affirm the judgment, finding no other reversible error.

THE FACTS

On June 9, 1984, the police in Marvell, Arkansas, which is in Phillips County, were contacted by Clarendon city officers in nearby Monroe County regarding Starr. He was wanted for questioning about a burglary and theft. The Marvell officers located Starr, brought him in for questioning, and asked him to empty his pockets, which he did. Starr saw an opportunity to flee and did. He was not under arrest. Warrants for his arrest for burglary and theft were issued that day in Monroe County.

On June 11 about 11 a.m., Mrs. Ford was brutally murdered outside her home. She was struck twice with a metal pipe, dragged inside her home and sexually assaulted. The house was ransacked. Her body was found by relatives shortly thereafter, and the police arrived on the scene about 1 p.m.

According to two officers, Starr became a suspect during the investigation conducted at Mrs. Ford's home. Kenneth Winfrey, chief deputy sheriff of Phillips County, responding to a call, went immediately to the scene. He said Starr became a suspect for three reasons: Starr was seen in a nearby field near a wooded area (the field was a quarter to a half mile away); many footprints were found in that area similar to those found outside Mrs. Ford's home; and he was informed that Starr had either done yardwork for Mrs. Ford or had gone to her home and asked about doing yardwork.

John Broome, a deputy sheriff from Phillips County, was also at the scene and said he learned the same information about Starr.

A full palm print was found in Mrs. Ford's home, footprints were found in the yard and blood and semen samples were taken.

The police began looking for Starr in Marvell and the surrounding area and on June 13, Starr narrowly avoided capture at his girlfriend's house. On June 14 the warrants from Monroe County for Starr's arrest for burglary and theft were received by the Marvell Police Department. The next day, June 15, about 1 a.m., Starr was arrested at his sister's home in Marvell. When the officers called for him to come out, he did. An officer entered the house and found a pistol behind a couch. It was later identified as being taken from the Ford residence.

Starr was taken to the Marvell jail, informed of his rights, and made a statement 23 minutes later. He was questioned largely about

the pistol which he said he got from a man whose name he did not know. He denied knowing about the murder of Mrs. Ford. He was then taken to the city jail in Helena and again warned of his rights. That evening he said he wanted to add to his statement. He was taken to the scene of the crime and said that his girlfriend, Shirley Smith, actually hit Mrs. Ford. He showed the police where he pulled up an iron pipe which was used to kill Mrs. Ford. He later told them where the pipe was hidden under a dresser in the house. He said his girlfriend found the gun and he took it. He admitted he and his girlfriend intended to rob Mrs. Ford.

His third statement followed shortly thereafter. Again, he wanted to tell the police more. This time he confessed in detail to the murder. The last two statements were recorded, transcribed and entered at the trial. In his last statement, he admitted striking Mrs. Ford, raping her afterwards, ransacking the house looking for money, and finding the pistol which he stole.

The officers all agreed that Starr was initially arrested on the basis of the two warrants from Monroe County. Starr was not arrested for the murder until after he confessed. The palm print found in Mrs. Ford's home was later identified as Starr's and other evidence tied Starr to the murder.

THE GOOD FAITH QUESTION

(1) It was argued below that the arrest, based on the warrants from Monroe County, was illegal and, therefore, all evidence produced as a result of the arrest must be excluded. That is the exclusionary rule. *WongSun v. United States,* 371 U.S.471 (1963). However, the United States Supreme Court has modified the exclusionary rule if officers act in the reasonable good faith belief that a search or seizure was in accord with the Fourth Amendment. *United States v. Leon,* 468 U.S. 897 (1984). The court stated:

> In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. '[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law' .... Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations .... [T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable . . . [I]t is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

That ruling has been extended to include evidence obtained by police who act in objective reasonable reliance on a statute later found unconstitutional. *Ill. v. Krull, U.S.* , 107 S. Ct.1160 (1987). More recently an extension was made to cover the actual execution of a search warrant. *Maryland v. Garrison,* 480 U.S. 79 (1987).

In this case the question is: should the officers have known the Monroe County warrants were invalid because they were signed by a clerk instead of the judge? There is no evidence at all that the warrants were issued except in good faith. A pretrial motion was filed alleging no probable cause to arrest Starr "on murder." No hearing was held on this question, counsel merely argued and the judge overruled the pretrial motion to suppress. The state said it would produce evidence that he was arrested on warrants for burglary. Later, the warrants were presented, and after the testimony of the officers, the defense argued the arrests were invalid on the basis of *Stewart v. State,* 289 Ark. 272, 711 S.W.2d 787 (1986). In *Stewart* blank warrants were signed by the judge and left with the clerk to issue. A

policeman obtained such a warrant on the basis of an unsworn affidavit. We held the arrest invalid and found no evidence of any good faith. In this case the defense argued these Monroe County warrants were not signed by a judge, accompanied by an affidavit or information and, therefore, the arrest was invalid. The trial judge distinguished the *Stewart* case and ruled the officers in this case acted in good faith.

We have only the unrefuted testimony of the officers. It was not uncommon for the clerk to sign warrants. The warrants appeared regular to them on their face, and they acted in good faith in executing them. There was no evidence offered controverting the fact that Starr was wanted for the burglary and theft in Monroe County. That is, the argument was not that there was actually no probable cause, merely the warrants were invalid on their face and for that reason there was no probable cause. Our own rules of criminal procedure provide that "the clerk of the court or his deputy may, when authorized by the judge of that court, issue an arrest warrant upon filing of an information or upon affidavit sworn to by the complaint and approved by the prosecuting attorney." A.R.Cr.P. Rule 7.1 (c). These officers did what any ordinary Arkansas policeman would have done at the time—they arrested Starr.

[2] The trial occurred in October, 1986. In September, 1987, the United States District Court for Eastern Arkansas decided it is illegal for a clerk to issue an arrest warrant unless a probable cause determination has been made by a neutral and detached magistrate. *Fairchild v. Lockhart,* 675 F.Supp. 469 (E.D. Ark. 1987). We have accepted that decision as correct. *David v. State,* 293 Ark. 472, 739 S.W.2d 150 (1987). These officers could not anticipate, nor should they have to, that an accepted practice would be ruled illegal—that our own rules would be declared wrong. There was no dishonest or reckless behavior on the part of any of the officers in this case; there is no evidence refuting they acted in good faith in accepting these war-

rants which appeared routinely issued.

[3] It is pointed out that A.R.Cr.P. Rule 7.2(a)(v) provides that an arrest warrant will have attached to it a copy of an information or an affidavit. It is also pointed out that *Leon* does not apply to facially invalid warrants. That omission is not, in our judgment, fatal. We will not assume it is customary in Arkansas that every arrest warrant have attached the information or affidavit. It is not even necessary for an officer to have an arrest warrant in his hand to make an arrest. In *Woodall v. State,* 260 Ark.786,543 S.W.2d 957 (1976), two state policemen, acting on the basis of information from the law enforcement computer indicating an out-of-state warrant, arrested a defendant. The officers had no warrant. Probable cause is evaluated on the basis of the collective information of the police. *Jones v. State,* 246 Ark.1057.441 S.W.2d 458 (1969). *See also Logan v. State,* 264 Ark. 920, 576 S.W.2d 203 (1979).

[4] It is argued that *State v. Anderson,* 286 Ark. 58, 688 S.W.2d 947 (1985), and *Webb v. State,* 269 Ark. 415, 601 S.W.2d 848 (1980), require reversal of the trial court's decision. In *State v. Anderson* the issue involved a search warrant issued without an accompanying sworn affidavit or sworn recorded testimony. We said "the procedure of providing an affidavit when obtaining a search warrant is so standard a practice that we cannot consider such a deficiency as falling within the purview of the good faith error." That requirement is in the United States Constitution. The ordinary officer knows better than to seek a search warrant without any affidavit, or he should. The same is, of course, not true of an arrest warrant unless the officer executing it obtained it in bad faith. As we have demonstrated, an officer does not even have to have the warrant in hand.

In *Webb* we found a warrant issued by a clerk defective but upheld the arrest on the basis of probable cause. The officer had probable cause because he relied upon information that an arrest warrant

was outstanding. *Webb* did not declare the practice illegal of a clerk issuing a warrant. *See Fairchild v. Lockhart supra,* in which the court discussed the meaning of *Webb.*

[5] The only objection at the trial was because the clerk signed the warrants and there were no accompanying affidavits. The only authority argued to the trial judge was the *Stewart* decision which he distinguished. It is now argued that even if there was probable cause, the warrants were invalid on their face and the good faith exception should not apply. The trial judge thought he was ruling on the question raised in *Stewart v. State, supra.* It was not until *Fairchild v. Lockhart, supra,* that the Arkansas legal community changed its practice. What we have is a decision by the trial court based on objections specifically made, testimony and evidence offered, and our review is limited to whether he was wrong. *Harris v. State,* 295 Ark.456,748 S.W.2d 666 (1988).

There is no evidence that the officers acted except in good faith and according to custom. No pretrial motion was filed making the argument now made on appeal. A narrow legal argument was made after the officers' testimony. There is no suggestion raised that this was a pretextual arrest.

In *Hines v. State,* 289 Ark. 50, 709 S.W.2d 65 (1980), we said:

> On appeal, all presumptions are favorable to the trial court's ruling on the legality of the arrest and the burden is on the appellant to demonstrate error.... [A] nontechnical approach has been said to afford the best compromise for accommodating the competing interests of the individual and of society ....

Other than the technical objection to the warrants, no evidence was offered to refute the officers' repeated testimony that Starr was warned

of his rights and voluntarily confessed. So we conclude the confessions were properly admitted and the trial judge was not clearly wrong in upholding the arrest.

REMAINING ARGUMENTS

The remaining arguments are also procedural. Two prospective jurors, Mrs. Janice Aikman and Mrs. Gynith Papa, admitted they had read a brief article in a local newspaper which mentioned the fact that Starr had a prior record and had spent time in the state prison. Mrs. Aikman and Mrs. Papa both said they could set aside any information they had gained and render a fair verdict. The judge refused to excuse them for cause. Our study of the record reflects that the trial judge was careful in his judgment and both prospective jurors were questioned extensively. They were excused peremptorily by the defense.

[6, 7] Jurors are presumed unbiased, and the trial judge has considerable discretion in seating them. *Fleming v. State,* 284 Ark.307,681 S.W.2d 390 *(1984); Linnell v. State,* 283 Ark.162, 671 S.W.2d 741 (1984). We have recognized that it is not practical to expect jurors to live in a vacuum. *Davis v. State,* 251 Ark.771,475 S.W.2d 155 (1972). We find no error in the court's ruling.

[8] The third argument is that the trial judge erred in failing to answer the jury's questions about the meaning of life without parole, the verdict forms and what a hung jury is. We have repeatedly held that the trial court should not attempt to explain matters concerning parole. *Pruett v. State,* 282 Ark.304, 669 S.W.2d 186 (1984). The court was right in not further instructing the jury on what life without parole means. It is always best to stick to the standard instructions. If they are complete, the jury can decide what to do. We find no abuse of discretion in refusing to further instruct the jury.

The fourth argument is about pecuniary gain being an aggravating circumstance in the penalty phase of the trial. This argument has been answered in *Lowenfield v. Phelps, U.S.* ___, 108 S. Ct. 546 (1988) and *O'Rourke v. State,* 295 Ark. 57, 746 S.W.2d 52 (1988).

[9] The fifth argument is that the court should have appointed an independent psychiatrist or psychologist to assist with the preparation of the case. The defense argues it wanted to show that Starr could not intelligently waive his rights. There is no doubt that Starr is mildly retarded. He was examined at the local mental health clinic and given an extensive examination at the state hospital. The hospital findings were: (1) mild mental retardation; (2) mixed substance abuse—continuous; and (3) antisocial personality disorder. The report concluded that Starr could understand right from wrong. The defense did call Dr. Michael Simon, a clinical psychologist at the state hospital. He testified that Starr could not read. One of the officers had testified that Starr, one time, read his rights himself. The psychologist testified that Starr was retarded and had an I.Q. of 62. The defense does not contend that the mental examination of Starr did not fulfill the requirements of *Ake v. Oklahoma,* 470 U.S. 68 (1985). It contends more was required in this particular case. State officials who examined Starr would have been available to answer any questions Starr had in that regard. The answers sought by Starr were simply not there. He could understand his rights even though he is mildly retarded. *See White v. State,* 290 Ark. 130,717 S.W.2d 784 (1986). His confessions reinforce this conclusion. Starr's answers were clear, distinct and coherent. He signed his name and the officers testified it was clear that he knew what he was doing. There is no suggestion any coercion was used, direct or indirect.

[10] The sixth argument is that the trial judge should have instructed the jury it was not required to impose the death penalty. AMCI 1509 was the instruction given, and a jury can, by finding that circumstances do not warrant the imposition of the death penalty, return

a verdict of life without parole. *Clines v. State,* 280 Ark. 77, 656 S.W.2d 684 (1983).

[11] The seventh argument is that the gun should have been suppressed. No pretrial motion was filed, simply an objection made when the gun was admitted into evidence. It was found in Starr's sister's home—not Starr's home. Based on the evidence before the trial judge, he was justified in finding that Starr had no standing to object to the warrantless search of his sister's home. *Rakas v. Illinois,* 439 U.S.128 (1979); *State v. Hamzy,* 288 Ark. 561, 709 S.W.2d 397 (1986).

We are required in a death case to compare the crime with those of others receiving the death sentence. The brutal, senseless bludgeoning of Mrs. Ford and the subsequent violation of her body was especially offensive, inhuman and cruel, and unquestionably warranted the death penalty. The evidence of Starr's guilt is overwhelming.

We have examined the record for other errors which would require a new trial and find none.

Affirmed.

PURTLE, DUDLEY, and NEWBERN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting.

> The right of the people to be secure in their *persons,* houses, papers, and effects, against unreasonable searches and *seizures,* shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the *person* or things

to *be seized.*

These, with certain of them emphasized, are the words of the Fourth Amendment to the United States Constitution.

The words of Ark. R. Crim. P. 7.2. follow:

> Rule 7.2. Form of Warrant.
>
> (a) Every arrest warrant shall:
>
> (iii) be signed by the issuing official with the title of his office and
>
> (v) have attached a copy of the information, if filed, or, if not filed, a copy of any affidavit supporting issuance
>
> . . . .

In *State v. Anderson,* 286 Ark.58,688 S.W.2d 947 (1985), we refused to consider the "good faith rule" of *United States v. Leon,* 468 U.S. 897 (1984), as legitimating a search based on a warrant with no supporting affidavit, and we wrote: "The procedure of providing an affidavit when obtaining search warrants is so standard a practice that we cannot consider such a deficiency as falling within the purview of good faith error." The Monroe County warrants which the state says formed the basis for Starr's arrest in Phillips County were equally deficient. Officer Nolan of Monroe County testified he did not see any affidavit with the warrants for David Starr's arrest. Rule 7.2(a)(v) requires that either an information or an affidavit be attached to an arrest warrant. The burglary and theft warrants were signed by Tammy Ellis who, Officer Nolan testified, was a court clerk. Under her signature, were the following words printed on the warrant form, "Municipal Judge, Clarendon, Monroe County, Arkansas." The word

"Judge" under her name was crossed out, and nothing was put in its place. Rule 7.2(a) (ii) requires a signature by the issuing official with the title of his office.

To justify its application of the *Leon* case doctrine here, and thus avoid the exclusionary rule, the majority opinion makes two points. First, it says that the affidavit in support of a search warrant, which was the element lacking in the *Anderson* case, is required by the Constitution. Clearly, there is, in the Fourth Amendment, the same requirement for an arrest warrant, and that requirement is reflected in our rules. I suggest the requirement for supporting documentation is just as "standard" in arrest warrant cases as in search warrant cases. Second, the majority opinion says that a police officer need not have an arrest warrant in hand when the arrest occurs. That is true, Ark. R. Crim. P. 4.3., but it does not justify an arrest where there is no supporting document attached to the warrant pursuant to which the arrest was made, and the state cannot even produce testimony after the fact that such a document existed. Nor does it justify the admission of evidence which results from such an arrest where the state cannot show compliance with the rules of criminal procedure.

The requirement of Rule 7.2. that the warrant have the supporting documentation attached to it makes sense. Otherwise, by "community custom" a practice could develop which would permit an arrest on the basis of a piece of paper with no support whatever. The arresting officer could say, as here, that he made the arrest assuming the warrant was good, and thus he or she acted in good faith.

Just as we did not get to it in the *Anderson* case, I do not find it necessary even to consider application of the *Leon* case doctrine here. However, if that were the issue, it would not seem to me to be too much to require an officer to examine or at least to inquire about an arrest warrant to learn whether it is signed by someone purporting to

be an authorized official and is accompanied by a supporting document or documents before we hold that the officer has acted in good faith in executing the warrant. In its zeal to expand upon the *Leon* case, the majority applies it in a way not demonstrably intended by its authors, and in the process the Fourth Amendment requirement that there be more than a piece of paper styled "arrest warrant" is subverted.

I respectfully dissent.

PURTLE and DUDLEY, JJ., join this opinion.

Supreme Court, U.S.
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No. 94 470

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

LARRY NORRIS, Director,
Arkansas Department of Correction,
Petitioner

v.

DAVID LEE STARR,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JACK T. LASSITER *
Ark. Bar No. 73072
Hatfield and Lassiter
401 W. Capitol Ave., Ste. 502
Little Rock, AR 72201
(501) 374-9010

-and-

DEBORAH SALLINGS
Ark. Bar No. 80127
Ark. Death Penalty Resource Center, Inc.
1500 Riverfront Dr., Ste. 118
Little Rock, AR 72202
(501) 663-1440

Attorneys for Respondent
* Counsel of Record

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No. _____

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v.

DAVID LEE STARR,
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FOR THE EIGHTH CIRCUIT

Respondent, David Lee Starr, respectfully requests that this Court deny the petition for writ of certiorari to review the opinion in this case of the United States Court of Appeals for the Eighth Circuit, which is reported as *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994).

STATEMENT OF THE CASE

Respondent Starr does not take issue with the discussion of the facts related to the circumstances of the offense and the events leading to his arrest and conviction, as set forth in Petitioner Norris's Statement of the Case. Mr. Starr, however, submits the following as his statement of the relevant legal considerations giving rise to the present action.

The United States District Court denied Mr. Starr's federal habeas corpus action on all grounds, and the Eighth Circuit Court of Appeals affirmed the district court with respect to the guilt phase issues raised in Mr. Starr's habeas corpus petition. The court of appeals reversed the district court and granted relief on two penalty phase issues, however, finding, first, that Mr. Starr was denied effective assistance of counsel by his trial counsels' failure to object to the submission of the aggravating circumstance that the murder was committed in an especially heinous, atrocious, or cruel manner; and second, that Mr. Starr was denied due process of law by the trial court's failure to provide him with the assistance of a psychiatric expert to develop, prepare and present mitigating evidence in the penalty phase.

In deciding this case, the court of appeals properly determined that *Ake v. Oklahoma*, 470 U.S. 68 (1985), required the appointment of a defense expert to assist in the penalty phase; the court of appeals applied the appropriate harmless error standard in determining whether Mr. Starr was prejudiced by the *Ake* violation, under the circumstances of this case; and the court of appeals properly found that Mr. Starr was denied effective assistance of counsel and that, under the circumstances of this case, resentencing was the only and proper remedy. Accordingly, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT RESPONDENT WAS ENTITLED, UNDER *AKE v. OKLAHOMA*, TO THE APPOINTMENT OF A PSYCHIATRIST TO ASSIST RESPONDENT IN DEVELOPING, PREPARING AND PRESENTING MITIGATING EVIDENCE IN THE PENALTY PHASE OF HIS CAPITAL MURDER TRIAL, BECAUSE THE MENTAL HEALTH EVALUATION PROVIDED TO RESPONDENT PURSUANT TO ARKANSAS STATUTE BY THE ARKANSAS STATE HOSPITAL DID NOT ADDRESS MITIGATION

Initially, Mr. Starr would briefly address Petitioner Norris's "perplexing" contention, *see Starr v. Lockhart*, 23 F.3d 1280, 1287 (8th Cir. 1994), that this issue is procedurally barred. The record of this case unmistakably reflects that a motion was made prior to trial (and supplemented with additional information at a later date), for a psychological expert for the purpose, *inter alia*, of evaluating Mr. Starr for mitigating evidence, and that this motion was denied by the trial court, which found that the evaluation of Mr. Starr by the Arkansas State Hospital was sufficient. While the precise issue addressed by the Eighth Circuit Court of Appeals - whether Mr. Starr was entitled to psychiatric assistance for the penalty phase of his trial - was not briefed in his direct appeal to the Arkansas Supreme Court [Mr. Starr argued only that he was entitled to psychiatric assistance on the issue of his ability to understand and waive his rights, *see Starr v. State*, 759 S.W.2d 535 (Ark. 1988), *cert. denied*, 494 U.S. 1019 (1989)], the Eighth Circuit correctly recognized that in appeals of capital cases, the Arkansas Supreme Court considers all objections and motions decided adversely to a defendant, whether specifically raised in the appeal brief or not. See Rule 4-3(h), Rules of the Arkan-

sas Supreme Court and Court of Appeals[1]; *Parker v. State*, 717 S.W.2d 800 (Ark. 1986); *Fretwell v. State*, 708 S.W.2d 630 (Ark. 1986); *Smith v. State*, 536 S.W.2d 289 (Ark. 1976). Such a review is sufficient to preserve the issue for federal habeas corpus review. *Ruiz v. Lockhart*, 754 F.2d 254 (8th Cir. 1985); *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985); *cf. Smith v. Digmon*, 434 U.S. 332 (1978) (failure of state court to address issue in opinion does not establish that the issue was not raised). Moreover, this issue was presented to the Arkansas Supreme Court in Mr. Starr's post-conviction petition pursuant to Ark. Rules Crim. Pro., Rule 37, and the court refused to grant relief on this issue, apparently including its denial in its finding that the issue had already been decided against Mr. Starr in his direct appeal.

Petitioner Norris also claims, in support of his contention that this issue is procedurally defaulted, that Mr. Starr specifically declined to raise this claim to the Arkansas Supreme Court (Petition at pp. 1, 2), although Mr. Norris does not state the grounds upon which he bases this assertion. Mr. Starr can only assume that Mr. Norris relies upon the following statement, which is found in Mr. Starr's brief to the Arkansas Supreme Court:

> The [trial] court in its original ruling was correct when it took the position set out in *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971), that due process requirements were met with regard to insanity, that it was not necessary to furnish him with a second expert witness of the defendant's choice.

This obscure statement may have been the basis for the observation in the Arkan-

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[1]Formerly Rule 11(h).

sas Supreme Court opinion that "the defense does not contend that the mental examination of Starr did not fulfill the requirements of *Ake v. Oklahoma*, 470 U.S. 68 (1985)." *Starr v. State*, 759 S.W.2d at 539. The *Andrews* case cited in Mr. Starr's appeal brief has nothing at all to do with the assertion for which counsel cited it[2], however, and what Mr. Starr's appellate counsel meant by this statement is a mystery. He did go on in the appeal brief to say that the court overlooked two more important arguments that counsel made on several occasions, one of which was that without additional psychiatric examination, counsel could not effectively represent Mr. Starr. Finally, the record does not reveal that Mr. Starr conceded that his attorneys' objection and request for expert assistance for mitigation was meritless. Therefore, because the Arkansas Supreme Court under Rule 4-3(h) considered the issue, it was not procedurally defaulted, and Petitioner Norris's argument to the contrary is meritless.

The issue here is whether Mr. Starr was entitled, under *Ake v. Oklahoma*, 470 U.S. 68 (1985), to a psychiatric expert to assist in developing, preparing and presenting evidence of mitigating circumstances in the penalty phase of his capital murder trial. It was not disputed that Mr. Starr was evaluated at the Arkansas State Hospital pursuant to Arkansas statutory provisions for competency examinations for criminal prosecutions, Ark. Code Ann. Sec. 5-2-305, or that this evaluation was "independent", *see Beard v. State*, 816 S.W.2d 860 (Ark. 1991), or that

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[2]The issues in *Andrews* were whether the trial court should have instructed the jury about the defendant's parole eligibility and whether the court should have had *ex parte* communication with certain jurors during deliberations.

the state hospital's mental health personnel were competent to perform the evaluation required by the statute. The question addressed by the Eighth Circuit, however, was whether this statutory examination was sufficient to meet the requirements of *Ake* because the examination did not encompass an evaluation for mitigating circumstances. The Eighth Circuit correctly applied *Ake* when it determined that Mr. Starr's examination did not meet due process requirements.

Petitioner Norris obfuscates the significant distinction between mental health issues constituting a defense to the crime, *i.e.*, a defendant's criminal **responsibility** for his actions, which is at issue in the guilt phase of a capital murder trial[3], and such issues in the penalty phase, where the mental health evidence is not interposed as a defense to the crime but rather as a mitigating circumstance[4], *i.e.*, as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Neal v. State*, 623 S.W.2d 191, 193 (Ark. 1976).

The issue addressed by the Eighth Circuit was not, as Mr. Norris asserts, whether Mr. Starr was entitled to "**additional** assistance of a favorable psychiatrist of his own choosing", but rather, whether Mr. Starr was entitled to psychiatric assistance **in the first instance** to develop and present relevant mitigating evidence

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[3] In Arkansas, it is an affirmative defense to a prosecution, *see* Ark. Code Ann. § 5-2-312, that a defendant lacked the capacity, as a result of a mental disease or defect, to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct. Ark. Code Ann. § 5-2-305 (d) (3) and (4).

[4] Ark. Code Ann. § 5-4-605 (1), (2) and (3) sets out the statutory mitigating circumstances related to a defendant's mental condition. These include: whether the defendant was under extreme mental or emotional disturbance, whether he was acting under unusual pressures or influences, and whether his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect. None of these circumstances constitutes a defense to the crime.

in the penalty phase of his trial, evidence that was not addressed by or developed in the competency examination of Mr. Starr that was done pursuant to Arkansas law. The statute under which the examination was ordered and conducted, Ark. Code Ann. Sec. 5-2-305, addresses only the question of criminal responsibility, that is, whether the defendant suffers from a mental disease or defect that affects his capacity to form the requisite criminal intent and/or his fitness to stand trial. This statute provides, in pertinent part:

> (a) Whenever a defendant charged in circuit court:
>
> (1) Files notice that he intends to rely upon the defense of mental disease or defect, or there is reason to believe that mental disease or defect of the defendant will or has become an issue in the cause; or
> (2) Files notice that he will put in issue his fitness to proceed, or there is reason to doubt his fitness to proceed, the court ... shall immediately suspend all further proceedings in the prosecution. ...
>
> (b)(1) Upon suspension of further proceedings in the prosecution, the court shall enter an order:
>
> ...
>
> (D) Committing the defendant to the Arkansas State Hospital ... for the purpose of the examination for a period not exceeding thirty (30) days, or such longer period as the court determines to be necessary for the purpose.
>
> ...
>
> (d) The report of the examination shall include the following:
>
> (1) A description of the nature of the examination;
> (2) A diagnosis of the mental condition of the defendant;
> (3) An opinion as to his capacity to understand the proceedings against him and to assist effectively in his defense;
> (4) An opinion as to the extent, if any, to which the capacity of the

defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the conduct alleged; and

(5) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charges.

Thus, the only purpose of a state hospital evaluation conducted under this statute is to determine whether a defendant has a defense to the crime (or lacks fitness to stand trial). *See Shelton v. State*, 699 S.W.2d 728, 735 (Ark. 1985) (the purpose of this statute is to prevent trial of incompetent persons and persons who lack the capacity to form the requisite criminal intent). As the Eighth Circuit correctly observed, however, under *Ake*, "... due process requires access to an expert who will conduct, not just any, but an appropriate examination." *Starr v. Lockhart*, 23 F.3d at 1289, *citing Ake v. Oklahoma*, 470 U.S. at 83. The court held that Mr. Starr's state hospital examination was not an appropriate one "because it did not delve into the mitigating questions essential to Starr." 23 F.3d at 1289. Indeed, the Arkansas Supreme Court has recognized the shortcomings of a state hospital examination under this statute for penalty phase issues. *See Coulter v. State*, 804 S.W.2d 348, 356 (Ark.), *cert. denied*, 112 S. Ct. 102 (1991), in which the court observed, "A report on these four items [Ark. Code Ann. Sec. 5-2-305 (d) (1) - (4)] is obviously not broad enough to cover everything a defendant might raise as a 'mental defect' basis of mitigation, ..." In *Coulter*, however, the court found the defendant was not prejudiced by the failure of the trial court to appoint an expert to assist in the penalty phase because Mr. Coulter's attorney had obtained the services of a psychologist with his own funds. *Id.*

This Court has consistently held that all persons who are guilty of a capital crime cannot, simply by virtue of their guilt, be subjected to the death penalty for that crime. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989); *Sumner v. Shuman*, 438 U.S. 66 (1987); *Lockett v. Ohio*; *Woodson v. North Carolina*, 428 U.S. 280 (1976). This Court has recognized that a defendant can appreciate the criminality of his conduct and be able to conform his conduct to the degree necessary to be held legally responsible for the crime, *i.e.*, to be found guilty of capital murder, but still be mentally impaired to such a degree that the ultimate penalty of death may be inappropriate. *Penry v. Lynaugh*. It is the purpose of mitigating evidence in the penalty phase to provide a method for the sentencer to make an individualized determination of the particular defendant's blameworthiness, *i.e.*, his moral culpability. *Penry v. Lynaugh*, 492 U.S. at 322-23, *citing California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring), and *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J. concurring in judgment).

The Arkansas statute under which Mr. Starr was evaluated addressed the first question but not the second. *Coulter v. State*. Accordingly, because there was no provision in the law for the evaluation of a defendant for purposes of developing, preparing and presenting mitigating evidence, the Eighth Circuit correctly determined that the examination conducted here did not provide Mr. Starr with the "basic tools" for the preparation of his defense against the death penalty, 23 F.3d at 1288, as required by *Ake*. 470 U.S. at 77. Thus, the narrow question addressed by *Starr v. Lockhart* is whether the Arkansas statutory provisions for

mental evaluations in criminal cases afford capital defendants a fair opportunity to address the issues peculiar to the penalty phase of a capital trial, as *Ake* requires. Since Arkansas law does not even suggest, much less require, that the Arkansas State Hospital do anything other than determine whether a defendant has a defense to the crime charged, and since such a determination, as a matter of law, does not encompass "everything a defendant might raise as a mental defect basis of mitigation", *Coulter v. State*, 804 S.W.2d at 356, the evaluation of Mr. Starr pursuant to the Arkansas statute was insufficient under *Ake*, as the Eighth Circuit correctly found.

Petitioner Norris misapprehends the basic principle of *Ake* when he argues, for example at p. 3 of his petition, that Mr. Starr "did not even point ... to some additional information" that a defense expert could have provided. *Ake* did not hold that a defendant is entitled to assistance if he can show what that assistance would entail. Rather, *Ake* makes it clear that when a defendant makes a *prima facie* showing that his mental condition is likely to be an issue at trial, including in the penalty phase, he is then entitled to the assistance of a psychiatrist to assist him in developing, preparing and presenting that evidence. *See Ake v. Oklahoma*, 470 U.S. at 84: "... [D]ue process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase." (Emphasis added.)

In this case, Mr. Starr made the requisite *prima facie* showing by presenting

evidence that he was mentally retarded (his IQ was 62[5], *Starr v. State*, 759 S.W.2d at 539), that he had received treatment at mental institutions for his mental retardation, and that he was raised in a seriously deprived and dysfunctional family, *Starr v. Lockhart*, 23 F.3d at 1287, which could have adversely affected his mental development. His mental retardation and its causes and effects were thus clearly established as issues in the trial as appropriate mitigating circumstances. Therefore, Mr. Starr was entitled to access to a psychiatrist's assistance "on **this** issue", *Ake v. Oklahoma*, 470 U.S. at 74. (Emphasis supplied.) Such assistance included an **appropriate** examination, *i.e.*, one directed toward evaluating these particular aspects of Mr. Starr's mental condition for the purpose of establishing valid mitigating circumstances, and to the assistance of an expert to develop and present that evidence at the penalty phase. There was no additional showing that needed to be made.

It should be mentioned, in this regard, that in the penalty phase of Mr. Starr's trial, the prosecutor repeatedly referred to Mr. Starr's mental retardation as being "mild", and he argued that such mild mental retardation was of no consequence. Mild mental retardation, however, is a significant impairment which can seriously affect a person's ability to function in society. Because he was not provided with expert assistance, Mr. Starr was unable to adduce evidence to rebut the prosecutor's mischaracterization of the extent of his impairment.

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[5]In 1993, the Arkansas legislature enacted Act 420, which forbids death sentences for the mentally retarded and creates a rebuttable presumption of mental retardation when the defendant's IQ is 65 or below. Ark. Code Ann. § 5-4-618.

Contrary to Mr. Norris's assertion at p. 5 of his petition, Mr. Starr did not contend (and the Eighth Circuit did not find) that he was entitled to an expert who would reach a biased or favorable conclusion on his behalf. He did contend, however, that he was entitled to the assistance of a psychiatrist whose responsibility it was to evaluate and develop evidence about his mental retardation **as a basis for mitigation**, rather than just as a basis for a defense to the charge. The Eighth Circuit agreed with this contention, finding that the evaluation performed by the state hospital, under the statute, was inadequate for these purposes. 23 F.3d at 1289.

Nor did the Eighth Circuit "assume" that the state hospital examination was inadequate. (Petition at p. 6) The court made a specific finding, based upon the clear and unambiguous language of the Arkansas statute and the interpretation of that statute by the Arkansas Supreme Court in *Coulter v. State*, that the evaluation was inadequate because it did not address this issue in question, *i.e.*, mitigating circumstances. 23 F.3d at 1289. Because it was not the business of the state hospital **by law** to conduct this type of evaluation, Mr. Starr was not obligated to pursue its assistance for these purposes. He made the requisite *prima facie* showing, through the state hospital report on his competency, that he had a mental condition that would be an issue at sentencing. As a result, *Ake* required that he be afforded access to an expert witness to develop this evidence as mitigating evidence.

Finally, Mr. Norris's argument - that the decision in *Starr* was, in effect, a

determination that a defendant is entitled, under the sixth amendment, to the effective assistance of experts, and as such, is a "new rule" not applicable to Mr. Starr under *Teague v. Lane*, 489 U.S. 288 (1989) - is misleading and misconstrues the rationale of *Starr*. The Eighth Circuit did not determine that the state hospital was ineffective in providing the evaluation and assistance Mr. Starr needed; rather, the court found that the state hospital did not provide appropriate assistance because such was not its mission under Arkansas law. 23 F.3d at 1289. The court's references to the testimony of the state hospital psychologist merely "illustrated", 23 F.3d at 1290, and underscored the inadequacy, for penalty phase purposes, of, and the prejudice resulting from, the type of examination provided by the state hospital.

In summary, the Eighth Circuit's decision in *Starr v. Lockhart* is entirely consistent with, and does not expand, *Ake v. Oklahoma*. It is a correct application of *Ake* to the particular circumstances of Arkansas law, and for that reason, review by this Court of that decision is unwarranted and should be denied.

II.

THE CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE *CHAPMAN v. CALIFORNIA* HARMLESS ERROR REVIEW BECAUSE THE ERROR THE COURT FOUND IN THIS CASE WAS ONE NOT FOUND BY THE STATE COURT AND THUS ITS PREJUDICIAL EFFECT HAD NEVER BEEN DETERMINED BY A REVIEWING COURT

The Eighth Circuit Court of Appeals, in an appeal from the district court's denial of habeas corpus relief, determined that Mr. Starr had been deprived of due process of law by the failure of the state to provide him with expert assistance to

develop and present evidence of mitigating circumstances related to his mental retardation at the penalty phase of his trial. *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994). In determining whether this error was prejudicial to Mr. Starr, the Eighth Circuit applied the standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967) - whether the error was "harmless beyond a reasonable doubt" - rather than the standard articulated as the standard of review of constitutional errors in habeas corpus in *Brecht v. Abrahamson*, 507 U.S. ___, 113 S. Ct. 1710, 1722 (1993) - whether the error had "substantial or injurious effect or influence in determining the jury's verdict". *Starr v. Lockhart*, 23 F.3d at 1292. Petitioner Norris contends that the Eighth Circuit's application of the *Chapman* standard was improper because the *Brecht* standard of review is now the only permissible standard of review in federal habeas corpus, regardless of whether the error has ever received a *Chapman* review.

Petitioner Norris's argument overlooks a significant distinction between *Brecht* and the instant case, however, and that is that every court that had considered the issue assigned in *Brecht*[6], including the state courts, had found there to be constitutional error. The **only** question, in any of the reviewing courts, was whether the error was harmless.

In the instant case, however, when the *Ake* issue was presented in Mr. Starr's direct appeal and in his state post-conviction proceedings under Ark. Rules

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[6]The issue in *Brecht* was whether the prosecutor improperly commented on the defendant's post-arrest silence, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976).

Crim. Pro., Rule 37, the Arkansas Supreme Court refused to grant relief, finding that the mental examination by the Arkansas State Hospital was sufficient under *Ake*, and hence there was no deprivation of Mr. Starr's due process rights. The state court thus twice determined that there was **no constitutional error committed**, and therefore the court had no occasion to review the error ultimately found by the Eighth Circuit, under any standard, to determine whether it was harmless.

It is clear, even after *Brecht*, however, that *Chapman* analysis is a necessary component of the protection against constitutional violations and is necessary to ensure proper review of constitutional errors. This Court stated:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the **identical** approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

Brecht v. Abrahamson, 113 S. Ct. at 1721 (citation omitted; emphasis added).

In *Brecht*, the Court emphasized that the case had already been heard by five different courts, each had applied the *Chapman* standard, and each had reached a different conclusion as to the prejudicial effect of the error. Continued review under the identical standard in collateral proceedings was therefore found to be illogical and duplicative and to fail to afford the requisite deference to the ability of the state courts to correctly analyze and determine constitutional issues.

The instant case, however, does not involve an "identical approach to harmless-error review" under *Chapman*. The *Chapman* review by the Eighth Circuit

was the first time **any** court considered whether the deprivation of psychiatric assistance was harmless error, because this was the first occasion that a court had determined it **was** error. Clearly, had the Arkansas Supreme Court determined that Mr. Starr was entitled to an *Ake* expert, the court would then have been obliged to perform a *Chapman* review to determine whether Mr. Starr was prejudiced by the error. Had that court determined that the error was harmless beyond a reasonable doubt, however, *Brecht* would permit review of the lower court's decision by the federal court only to determine whether there was "actual prejudice". *Brecht v. Abrahamson*, 113 S. Ct. at 1722, *citing United States v. Lane*, 474 U.S. 438 (1986). *See, also, Kotteakos v. United States*, 328 U.S. 750 (1946). Since the state court did not perceive any error, however, it certainly did not make a determination whether it was harmless beyond a reasonable doubt. Because the Eighth Circuit review here was the first review of the error by any court, the review was correctly conducted under *Chapman* and not *Brecht*.

The basic philosophical underpinning of *Brecht* is not compromised by application, in this case, of the *Chapman* standard. In *Brecht*, this Court observed that state courts have an obligation to, and are fully qualified to, perform proper review of constitutional errors, 113 S. Ct. at 1721, and accordingly, a review of a constitutional error in federal court under the same standard as in the state court would threaten the state's sovereignty over criminal matters and ignore the states' interest in the finality of their decisions. *Id.* As the Court noted in *Brecht*, "Federal courts are not forums in which to **relitigate** state trials." 113 S. Ct. at 1719

(emphasis added), *citing Barefoot v. Estelle*, 463 U.S. 880 (1983). But when the question whether an error was harmless has not been litigated in the first instance, because the reviewing court found no error, the issue is not "relitigated" when the federal habeas court makes a *Chapman* review.

It is clear from *Brecht* that the *Chapman* standard of proof of harmless error is an important protection of the rights of defendants against trial errors, but it is also one that state courts can properly apply. When a state court has made the appropriate review, then federal courts have no reason to conduct the very same review. When the state court has not looked at the harmlessness of an error, however, because it did not recognize the error in the first place, however, the rationale for *Brecht*'s lower standard of review fails. As the Eighth Circuit observed:

> ...[A] state court could find a confession admissible because it was not coerced. If the confession was later found to have been coerced, its admission could not be presumed to have been determined to be harmless beyond a reasonable doubt simply because the state court had considered the issue of admissibility. In fact, it would be unusual for such an error to be harmless beyond a reasonable doubt. Thus, absent an alternative holding that even if there was error, it was harmless beyond a reasonable doubt, we will apply the *Chapman* test.

Starr v. Lockhart, 23 F.3d at 1292, n. 9.

Petitioner Norris's concern, at p. 11 of his petition, that requiring a *Chapman* review in cases where the state courts do not find error would encourage habeas petitioners to withhold claims until federal habeas to obtain a more favorable standard of review, is puzzling. He cites *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1610 (1994), in which the

Eighth Circuit did consider an issue that had not been presented in state court, holding that under those circumstances the *Chapman* standard of review would be appropriate to determine prejudice. The facts of *Orndorff* distinguish that case from *Starr*, however. In *Orndorff*, the issue raised in the habeas proceedings had not been presented in state court because, it was conceded, Mr. Orndorff was not aware of the error[7] until after he had exhausted his state remedies. Hence, Mr. Orndorff did not "withhold" the issue in order to raise it in habeas.

In the instant case, however, the *Ake* issue **was** before the state court, but that court never found it to be error. Extending *Chapman* to this situation, therefore, would not counsel a defendant to "withhold" an issue until habeas. Furthermore, it is fundamental that a habeas petitioner must exhaust his state remedies before proceeding into federal court, *Rose v. Lundy*, 455 U.S. 509 (1989); *Picard v. Connor*, 404 U.S. 270 (1971), and failure to raise a claim in state court results in a procedural default that can only be excused by showing cause and prejudice for the default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Counsel's intentional failure to raise a constitutional claim in state court, in order to obtain a more favorable standard of review in federal habeas, clearly would not constitute cause for the default. *Murray v. Carrier*, 477 U.S. 478 (1986).

III.

THE CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT RESPONDENT'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO

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[7]The prosecutor had withheld from the defense information that his chief occurrence witness had been hypnotized prior to trial.

OBJECT TO THE "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE AND THAT RESENTENCING IS THE APPROPRIATE REMEDY UNDER THE CIRCUMSTANCES OF THIS CASE

At the outset, Mr. Starr wishes to correct Petitioner Norris's misstatement of the status of the law in Arkansas at the time of Mr. Starr's trial with respect to the constitutionality of the aggravating circumstance at issue. Mr. Norris defines the issue as "Whether it was error for the Eighth Circuit Court of Appeals to determine that Starr's counsel were ineffective for not challenging an aggravating circumstance, *the constitutionality of which had previously been upheld by the state court?*" (Petition at p. 18, emphasis added.) Contrary to Mr. Norris's statement, however, the aggravating circumstance at issue - that the capital murder was committed in an especially heinous, atrocious, or cruel manner - had **not** "previously been upheld" by the Arkansas Supreme Court. This aggravating circumstance was added to the statutory list of possible aggravators in 1985, and at its **first** opportunity to consider the constitutionality of this circumstance, the Arkansas Supreme Court found it to be unconstitutionally vague. *Wilson v. State*, 751 S.W.2d 734 (Ark. 1988). Therefore, Mr. Norris's statement that this circumstance had "previously been upheld" is misleading and implies that the supreme court reversed previous precedent in *Wilson*, which definitely is not the case.

Turning to the question whether Mr. Starr was deprived of effective assistance of counsel, it is undisputed that his attorneys raised no objection, either at trial or on appeal, to the constitutionality of this aggravating circumstance. Nor is it disputed that this aggravating circumstance was unconstitutionally vague, under

Maynard v. Cartwright, 486 U.S. 356 (1988) and *Wilson v. State*, which was decided by the Arkansas Supreme Court on the same day as *Maynard*. Therefore, had Mr. Starr's attorneys objected to the submission of this aggravating circumstance, its use would have been found to be error.

Mr. Norris contends, however, that trial counsels' failure to object to this circumstance should not constitute ineffective assistance of counsel because counsel could not have "anticipate[d] a change in the law or an extension in the law, or a clarification in the law." (Petition at p. 20.) Neither *Maynard v. Cartwright* nor *Wilson v. State* was a change, extension, or clarification of the law, however, and the Eighth Circuit properly found ineffective assistance of counsel in counsels' failure to raise this issue.

In *Maynard v. Cartwright*, this Court held that there was no functional difference between the "outrageously or wantonly vile, horrible, and inhuman" aggravating circumstance found unconstitutionally vague in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and the "heinous, atrocious, or cruel" circumstance at issue in *Maynard*. The Arkansas Supreme Court reached the same conclusion in *Wilson v. State*. In *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130 (1992), this Court held that *Maynard* did not "break new ground" in applying *Godfrey* to the "especially heinous, atrocious, or cruel" circumstance, 112 S. Ct. at 1135, and therefore, Mr. Norris's contention that Mr. Starr's counsel should not have been

"burdened with anticipating" *Maynard* and *Wilson* is untenable[8]. As the Eighth Circuit stated:

> ..., the Supreme Court has determined that, after the 1980 *Godfrey* decision, reasonable minds could not fail to realize that the "heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague. We must therefore reject the district court's determination that counsel was not ineffective for failing to make this "novel" argument at trial. The argument was not "novel" in any sense of the word. The state's argument that Starr's counsel should not have been expected to foresee the "expansion" of *Godfrey* to *Maynard* is completely circular, because as the state itself admits, *Maynard* was not an "expansion" of *Godfrey*. *See Stringer*, 112 S. Ct. at 1135, 1140 (that *Maynard* is not a new rule is "a wise concession" by the State of Mississippi); *Newlon v. Armontrout*, 885 F.2d 1328, 1333 (8th Cir. 1989) (*Maynard* is an application of, not an extension of, *Godfrey* and is therefore not a new rule), *cert. denied*, 497 U.S. 1038 (1990). To be effective, counsel in capital cases must at least recognize and object to those sentencing factors which cannot reasonably be argued to be valid under existing law. We can conceive of no trial strategy that justifies a contrary approach, and therefore reaffirm our finding that Starr's counsel performed deficiently in failing to object to this aggravating circumstance.

Starr v. Lockhart, 23 F.3d at 1286.

No doubt recognizing that Mr. Starr's counsel should have challenged the aggravating circumstance, Mr. Norris next contends that "even ... failure to raise a claim that has been clearly defined" does not, in and of itself, constitute deficient performance when the decision not to raise the claim is based upon reasoned trial strategy. (Petition at p. 20.) There is no evidence whatsoever, however, that counsels' decision in this case was based on any "reasoned trial strategy" or upon anything other than lack of awareness of the existing law. As this Court has held,

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[8]It is worthy of some note that the attorneys for Messrs. Cartwright and Wilson were able to shoulder this "burden" sufficiently enough to raise the issue in the trials of these defendants.

"[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). *Godfrey*, a landmark case in death penalty jurisprudence, was decided in 1980; counsel should have been able to discover that case with a minimal amount of research, and their failure to do so cannot be excused. As this Court stated, in the context of the responsibility of defense counsel on appeal, "Every advocate has ... the same professional responsibility ... to thoroughly research the law ..." *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 438 (1988). The presumption that trial counsel rendered competent assistance is rebutted where trial counsel's decisions resulted from a lack of diligence in preparation and investigation. *See Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir.) (failure to investigate mitigating witnesses relates to trial preparation and not trial strategy and can be a basis of ineffective assistance of counsel), *cert. denied*, ___ U.S. ___, 112 S. Ct. 431 (1991). Clearly, therefore, the Eighth Circuit was correct in determining that counsels' performance was deficient in failing to recognize and object to this aggravating circumstance.

Even if there was deficient performance, Mr. Norris argues, there was no prejudice; rather, he contends that the Eighth Circuit "implicitly" and improperly found prejudice simply of the basis of counsels' error in permitting this circumstance to be submitted to and found by the jury. He asserts that even if there was a sufficient basis under *Godfrey* upon which to challenge this aggravating circumstance, the Eighth Circuit should not have found Mr. Starr to have been

prejudiced by the submission of this circumstance, because the jury found one other aggravating circumstance - that the murder was committed for pecuniary gain - in addition to this aggravating circumstance and no mitigating circumstances. By asserting that the Eighth Circuit found prejudice "automatically" from the erroneous submission of this aggravating circumstance, however, Mr. Norris distorts the Eighth Circuit's ruling.

The Eighth Circuit did not "presume" prejudice, as Mr. Norris contends, but instead correctly applied *Stringer v. Black* to the circumstances of this case. 23 F.3d at 1286. In *Stringer*, this Court specifically held that in weighing states such as Arkansas[9], the use of a vague aggravating factor **invalidates the sentence** and "at the very least" requires harmless error analysis or reweighing. 112 S. Ct. at 1140. The difficulty in the instant case, however, is that neither harmless error analysis nor reweighing is an available remedy, as the Eighth Circuit correctly determined. These remedies are unsuitable options because of the additional error in the trial court's failure to follow *Ake v. Oklahoma* and allow Mr. Starr access to the tools necessary to develop and present proof of a valid mitigating circumstance.

The trial court's denial of an *Ake* expert deprived the jury of mitigating evidence relevant to the determination of Mr. Starr's sentence. Had evidence of Mr. Starr's mental retardation been properly presented, the jury may well have

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[9]Under Arkansas law, a jury is required to make three findings beyond a reasonable doubt before imposing the death sentence: (1) that at least one aggravating circumstance exists; (2) that the aggravating circumstance(s) outweigh any mitigating evidence; and (3) that the aggravating circumstance(s) justify the death penalty. Ark. Code Ann. § 5-4-603.

found it to be a mitigating circumstance, as they would certainly have been permitted to do under the statutory mitigating circumstances, *see* Ark. Code Ann. Sec. 5-4-605 (3), as well as under *Penry v. Lynaugh*. Although Arkansas law does permit the Arkansas Supreme Court, when it determines that a jury has improperly found an aggravating circumstance, to conduct a harmless error review, this review can **only** be done if the court can ultimately conclude that the error would not have changed the jury's decision to impose the death penalty, *i.e.*, when there were no mitigating circumstances found, *see* Ark. Code Ann. Sec. 5-4-603(d)[10]; *Ward v. State*, 827 S.W.2d 110, 115 (Ark.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 124 (1992), and the court has not conducted this analysis where the jury found mitigating circumstances. *See, e.g., Sanders v. State*, 824 S.W.2d 353 (Ark. 1992); *Ward v. State*; *Wilson v. State*. Thus, because there was evidence of mitigating circumstances that was not presented because of the *Ake* violation, it cannot be known whether the jury might have found mitigating circumstances. Had the jury done so, the Arkansas Supreme Court would not be permitted under

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[10]This statute provides:

> On appellate review of a death sentence, if the Arkansas Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance or circumstances for any reason **and if the jury found no mitigating circumstances**, the Arkansas Supreme Court shall conduct a harmless error review of the defendant's death sentence. The Arkansas Supreme Court shall conduct this harmless error review by:
>
> (1) Determining that the remaining aggravating circumstance or circumstances exist beyond a reasonable doubt; and
> (2) Determining that the remaining aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt.
>
> (Emphasis added.)

the statute or its case law to conduct the harmless error review Mr. Norris urges.

Likewise, appellate court reweighing cannot be done in this case because the deprivation of an *Ake* expert resulted in there being insufficient evidence of Mr. Starr's mental retardation presented. Thus, although the jury might have found a mitigating circumstance if the evidence were properly presented, because the evidence was **not** presented, there is nothing in the record to weigh against the remaining aggravating circumstance to determine the effect of the erroneous submission of the vague aggravating circumstance. Mr. Norris's contention, at p. 21 of his petition, that "[t]here can be no presumption of prejudice where counsel does not adduce evidence at the penalty phase which would be mitigating evidence in an Eighth Amendment sense" simply ignores the fact that Mr. Starr was precluded from doing what Mr. Norris contends should have been done because the State refused to provide an expert witness to aid Mr. Starr in presenting that evidence.

Finally, Mr. Norris urges that, under *Walton v. Arizona*, 497 U.S. 639 (1990), the appropriate remedy would be to remand to the state appellate court "with the option of imposing a limiting construction" on the aggravating circumstance. The Arkansas Supreme Court, however, specifically declined to impose such a limiting definition of this aggravating circumstance when it was first faced with the issue, stating, "We have no better idea than the jury could have had in this case as to the meaning of the words [especially heinous, atrocious or cruel]." *Wilson v. State*, 751 S.W.2d at 738. Moreover, even if this aggravator

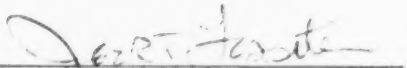
were capable of being constitutionally construed, because there was mitigating evidence that was not presented, a reviewing court would not be able to determine the effect of the unpresented evidence in determining whether the death penalty was appropriate in this case. Accordingly, only a resentencing hearing, with Mr. Starr being allowed to obtain an appropriate examination for mitigating circumstances by a defense expert, will eliminate the prejudice to Mr. Starr of the constitutional errors that occurred in his capital murder trial.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID LEE STARR

By: 

JACK T. LASSITER
Ark. Bar No. 73072
Hatfield and Lassiter
401 W. Capitol Ave., Ste. 502
Little Rock, AR 72201
(501) 374-9010

-and-

DEBORAH SALLINGS
Ark. Bar No. 80127
Ark. Death Penalty Resource Center, Inc.
1500 Riverfront Dr., Ste. 118
Little Rock, AR 72202
(501) 663-1440

Attorneys for Respondent